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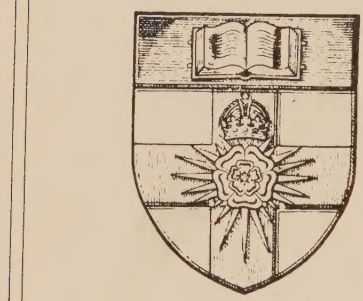

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THE IRISH REPORTS.

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1910.

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Lords Justices of Appeal.

The Right Hon. Hugh Holmes.

The Right Hon. Richard R. Cherry.

Chancery Division.

The Right Hon. R. E. Meredith, M.R.

The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. John Ross.

Irish Land Commission: Judicial Commissioners.

The Right Hon. J. O. Wylie.

The Hon. Gerald Fitz Gerald.

Attorney-General.

The Right Hon. Redmond J. Barry.

Solicitor-General.

Charles A. O'Connor, K.C.

[These Reports will be cited as follows :—[1910] 1 I. R.]

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CORRIGENDA.

Page 17, line 5 from foot of judgment, *for* "trustees" *read* "parties".

,, ,, line 9 ,, ,, *for* "decision" *read* "decisions".

,, ,, line 11 ,, ,, *for* "personally" *read* "personalty".

,, 220, line 14 from foot of page, *for* "and" *read* "or".

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1910.

IN THE MATTER OF THE ESTATES OF REV. C. M. OTTLEY AND PATRICK LEONARD. (WHITNEY'S RENT.)

Wylie, J.
1909.
Oct. 26.
Nov. 1.

Disentailing deed—Habendum—*Rectification*—*Jurisdiction*—*Fines and Recoveries* (*Ireland*) *Act* (4 *&* 5 *Wm.* 4, *c.* 92), *s.* 45—3 *&* 4 *Wm.* 4, *c.* 74, *s.* 47—*Construction*—*Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 51.

By a disentailing deed, reciting the creation of a rentcharge to the use of H. G. and the heirs male of his body, and that he was then entitled to, and in possession and receipt of, said rentcharge, it was witnessed that the said H. G. did, by that deed, intended to be enrolled in the High Court, pursuant to the statute, convey unto J. L. all that the said rentcharge so limited to him the said H. G. and the heirs male of his body, and all other the premises of which he was seised or entitled as tenant in tail, to hold the same freed and discharged from the estate tail of the said H. G., and all remainders, estates, and powers to take effect after the determination or in defeasance of said estate tail, unto the said J. L. *in fee* to the use of the said H. G. *in fee simple*. The said deed was duly enrolled:—

Held, that section 45 of the Fines and Recoveries (Ireland) Act (4 & 5

Wylie, J. 1909.

In re OTTLEY'S ESTATE.

Wm. 4, c. 92)—section 47 of 3 & 4 Wm. 4, c. 74—while prohibiting any Court from transforming, by the application of any equitable doctrine, a deed which, according to its legal construction, is ineffective to bar an entail, into a valid disentailing assurance, does not take away the general jurisdiction of a Court of Equity to rectify a disentailing deed, so as to bring its provisions into conformity with the actual intention of the parties; that, having regard to the terms of the deed in question, the words "in fee" were capable of being, and should be, construed as meaning "in fee simple"; and, accordingly, that, under section 51 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the deed was effectual to pass an estate in fee simple.

Hall-Dare v. *Hall-Dare* (31 Ch. D. 251) and *Bankes* v. *Small* (36 Ch. D. 716) considered. *In re Ethel and Mitchell's and Butler's Contract* ([1901] 1 Ch. 945) distinguished.

QUESTION OF LAW submitted by the Examiner for the decision of the Judicial Commissioner.

By a settlement dated the 10th July, 1869, John Godley, by virtue of a power vested in him, appointed certain lands, including the lands sold herein, to the use that Harry Crowe Godley and the heirs male of his body should, from the decease of the said John Godley, receive out of said lands a rentcharge of £300 per annum. The said John Godley died in 1877. The said Harry Crowe Godley, having attained age, by a disentailing deed, dated the 14th November, 1883, and made between the said Harry Crowe Godley of the one part, and James Lane of the other part, reciting (*inter alia*) the creation of the said rentcharge to the use of the said Harry Crowe Godley, and the heirs male of his body, and that he was then entitled to, and in possession and receipt of, said rentcharge, it was witnessed that he the said Harry Crowe Godley did by that deed, intended to be enrolled in the High Court, pursuant to the statute, convey unto the said James Lane all that the said rentcharge so limited to him the said Harry Crowe Godley, and the heirs male of his body, and all other the premises of which he was seised or entitled as tenant in tail, to hold the same, freed and discharged from the estate tail of the said Harry Crowe Godley, and all remainders, estates, and powers to take effect after determination or in defeasance of said estate tail, unto the said James Lane *in fee* to the use of the said Harry Crowe Godley *in fee simple*. The said deed was duly enrolled. By settlement executed on

the marriage of the said Harry Crowe Godley, in 1892, reciting that the said Harry Crowe Godley was absolutely entitled to said rentcharge, the said Harry Crowe Godley conveyed the same to the trustees therein named upon certain trusts, after his death, for the benefit of his wife and children. The said Harry Crowe Godley died in February, 1907, leaving his widow, an eldest son, Francis Godley, and other children, him surviving. The portion of said rentcharge apportioned on the lands sold had been redeemed, and the trustees of the settlement of 1892 claimed the redemption price thereof, as being subject to the trusts of said settlement. The Examiner submitted the question as to whether the disentailing deed of 1883 was effectual to bar the entail in said rentcharge.

Garrett Walker, K.C., for the trustees of the settlement of 1892:—

The question turns entirely upon the effect of the limitations in the disentailing deed of 1883. The Court should read in the word "simple" in the habendum either by construction, or, if necessary, by rectification of the deed. The intention is clearly expressed on the face of the deed. The Court will rectify the deed by supplying the word "simple" unless it is precluded by section 45 of the Irish Fines and Recoveries Act (4 & 5 Wm. 4, c. 92). The provisions of the section are undoubtedly strong, but, notwithstanding this fact, the Court has the same power to rectify a disentailing deed, so as to make it conform to the intention of the parties, as in the case of any other deed: *Hall-Dare* v. *Hall-Dare* (1), which was a decision on the corresponding section—section 47—of the English Act (3 & 4 Wm. 4, c. 74). Another decision to the same effect is *Bankes* v. *Small* (2). *Bonehole* v *Henderson* (3) shows that the jurisdiction of the Court to rectify is not confined to settlements for value. Even if the Court cannot rectify this deed, it can be treated as amended without any suit: *Mills* v. *Fox* (4).

(1) 31 Ch. D. 251.
(2) 36 Ch. D. 716.
(3) [1895] 1 Ch. D. 742.
(4) 37 Ch. D. 153.

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E. G. Swifte, for Francis Godley, the heir in tail :—

The *habendum* in the deed of 1883, being "unto James Lane in fee," a life estate only in the rentcharge was conveyed, and to that extent only did the deed operate as a disentailing assurance : *Holiday* v. *Overton* (1). In the case of a disentailing deed, the Court is precluded from applying the doctrine of rectification by the provisions of section 45 of the Irish Fines and Recoveries Act (4 & 5 Wm. 4, c. 92). Although the intention to convey the fee simple and effectually bar the entail is clearly shown on the face of this deed outside the words of limitation, the Court cannot supply the word "simple" either by the application of the equitable doctrine of rectification (*Meyler* v. *Meyler* (2)) or by construction. *Hall-Dare* v. *Hall-Dare* (3) was the case of a re-settlement. There it was sought merely to remedy an accidental omission. In the present case the Court is asked to alter the effect of the deed. In *Mills* v. *Fox* (4) Stirling, J., said that, under the section of the Fines and Recoveries Act in question, he was not at liberty to remedy defects of form. Under section 51 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), in the absence of the word "heirs" it is necessary that the actual words of limitation mentioned in the section, "in fee simple," should be used : *In re Ethel and Mitchell's and Butler's Contract* (5).

Nov. 1.

WYLIE, J. :—

In this case the Examiner has raised a very nice and difficult question as to the title to the redemption price of portion of a rentcharge of £300, payable out of the lands sold and other lands. By a settlement, dated the 10th July, 1869, John Godley, by virtue of a power vested in him, appointed certain lands, including the lands sold, to the use that Harry Crowe Godley and the heirs male of his body should, from the decease of said John Godley, receive out of said lands a rentcharge of £300 per annum. John Godley died in 1877, and by a disentailing deed,

(1) 14 Beav. 467.
(2) 11 L. R. Ir. 522.
(3) 31 Ch. D. 251.
(4) 37 Ch. D. 153.
(5) [1901] 1 Ch. 945.

dated the 14th November, 1883, the said Harry Crowe Godley, having attained age, purported to bar his estate tail in said rentcharge; and by his marriage settlement, dated April, 1892, reciting that he was absolutely entitled to said rentcharge, conveyed the same to the trustees upon certain trusts, after his death, for the benefit of his wife and children. The said Harry Crowe Godley died in February, 1907, and a portion of said rentcharge having been redeemed, the trustees of said settlement of 1892 claim the redemption price as being subject to the trusts of said settlement. On their showing title, the Examiner raised the question as to whether the disentailing deed of 1883 was effectual to bar the entail. The deed was duly executed and enrolled, and the question turns entirely upon the effect of the limitations in the deed. The deed is made between Harry Crowe Godley of the one part and James Lane of the other part, and after reciting the creation of said rentcharge to the use of him and the heirs male of his body, and that he was then entitled to, and in possession and receipt of, said rentcharge, it was witnessed that he, the said Harry Crowe Godley, did by that deed, intended to be enrolled in the High Court pursuant to the statute, convey unto the said James Lane all that the said rentcharge so limited to him the said Harry Crowe Godley and the heirs male of his body, and all other the premises of which he was seised or entitled as tenant in tail, to hold the same, freed and discharged from the estate tail of the said Harry Crowe Godley, and all remainders, estates, and powers to take effect after the determination or in defeasance of said estate tail, unto the said James Lane *in fee* to the use of the said Harry Crowe Godley in *fee-simple*. Now, those being the limitations in the deed, Mr. Swifte, on behalf of the heir in tail, contends that the *habendum* being merely "unto James Lane in fee," without the addition of the word "simple," the deed only conveyed a life estate, and therefore, to that extent only could it operate as a disentailing assurance. Mr. Swifte further contends that, though the intention to convey the fee-simple, and effectually bar the entail, is clearly shown on the face of the deed outside the words of limitation themselves, the Court cannot supply the word "simple" either by the application of the equitable doctrine of rectification, or by construction. Mr. Walker, on the other

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hand, for the trustees, contends that the word "simple" can be supplied either by construction, or, if necessary, by rectification. The intention of the parties is clearly shown on the face of the deed, and it is not denied that if this were an ordinary deed and not a disentailing assurance, the circumstances are such that a Court of Equity would, if necessary, rectify the deed by the insertion of the word "simple" in the limitation, but Mr. Swifte contends that in the case of a disentailing deed the Court is prohibited from doing this by section 45 of the Irish Fines and Recoveries Act (4 & 5 Wm. 4, c. 92)—section 47 of the English Act (3 & 4 Wm. 4, c. 74). That section provides that "in cases of dispositions of lands under this Act by tenants in tail thereof . . . the jurisdiction of Courts of Equity shall be altogether excluded, either on behalf of a person claiming for a valuable or meritorious consideration or not, in regard to the specific performance of contracts, and the supplying of defects in the execution of the powers of disposition given by this Act to the tenants in tail . . . and the supplying under any circumstances of the want of execution of such powers of disposition . . . , and in regard to the giving effect in any other manner to any act or deed by a tenant in tail . . . which in a Court of law would not be an effectual disposition . . . ; and that no disposition of lands under this Act by a tenant in tail thereof in equity . . . shall be of any force, unless such disposition . . . would in case of an estate tail at law be an effectual disposition . . . under this Act in a Court of law." The effect of this section has been the subject of discussion and decision in a number of cases, but none of them seems to me to rule this case.

In the case of *Hall-Dare* v. *Hall-Dare* (1), an action was brought for the rectification, on the ground of mistake, of a deed of re-settlement which had been enrolled as a disentailing assurance under the Act. Vice-Chancellor Bacon dismissed the action on the ground that the 47th section positively prohibited the exercise by Courts of Equity of their ordinary jurisdiction to rectify mistakes in the case of deeds which had been enrolled under this Act; but this decision was reversed on appeal. Lord

(1) 31 Ch. D. 251.

Halsbury, in giving judgment on appeal, referring to section 47, says (at p. 257) :—" So express is the enactment, that the Legislature, having before it the knowledge that the Court of Chancery had thought right to give effect to other documents than proper legal instruments, goes out of its way to exclude the jurisdiction of the Court with regard to supplying and remedying defective executions of powers and other matters, and contains express provisions, the effect of which is that the effect of the instrument and the rights of the parties shall be determined by the instrument which has been enrolled, and that there shall be no other instrument outside the enrolled deed which shall affect the legal dispositions made by the tenant in tail, and the protector of the settlement. Now, it seems to me, with all respect to the learned Vice-Chancellor, that this provision has no reference to the present application, which is an application to amend an instrument on the ground that it is not the instrument which the parties intended to execute and believed they were executing. The purport of the Act is, that there shall be one instrument, attended with certain formalities, including enrolment, and that nothing but that instrument shall be effectual as a disposition of the estate comprised in it. But what has that to do with the question whether that instrument, as executed, carries out the real intention of the parties. It appears to me to be entirely beside the question. The Legislature, having before it the jurisdiction of the Court of Chancery to rectify deeds, and by section 47, excluding, as it does in terms the jurisdiction to give effect to acts outside, or deeds outside and beyond the particular instrument, has provided what shall be the mode by which the transaction of barring an estate tail can be effected, but has omitted any reference to the well-known power of rectification. It must, therefore, have been intended to leave this jurisdiction unaffected." Lindley, L.J., also says (at p. 258) :—" If it had been intended by the Act to deprive the Court of the power of rectification, it ought to have been so stated in words which could not be mistaken . . . The object of the Act was to change the form of conveyance ; and it being inconvenient that an enrolled document should have different effects at law and in equity, the section goes on to say in substance that the enrolled deed shall not be affected by equitable doctrines.

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That section assumes, however, that the document enrolled represented the intention of the parties when they executed it, and was the deed which they intended to execute." In the same case, Fry, L.J., says (at p. 260):—"In my judgment the scope of the Act is to make the enrolled deed conclusive, but it would be monstrous and highly unjust to say that the instrument on parchment is to be conclusive of the rights of the parties for all time, however great the mistake or blunder, and however clear the evidence of it. On the other hand, if the deed is capable of amendment, it is most beneficial that it should be conclusive of the rights of the parties, so that it is the only instrument to which the parties need have recourse. Whether reformed or not, it alone must be looked to."

Now, reading those judgments apart from the particular facts of the case, they would seem to decide that, notwithstanding section 47 of the Fines and Recoveries Act, the Court has the same power to rectify a disentailing deed so as to make it conform to the intention of the parties as in the case of any other deed. But in reading and applying those judgments, it seems to me that we must have regard to the nature of the rectification applied for and granted in that case, which was, to insert in the deed limitations to the second and other sons of the tenant for life which had by mistake been omitted before the limitations over to collaterals. And what distinguishes that case from the present case is, that the amendment in that case had no effect upon the deed as a disentailing assurance. It was an effective disentailing deed, whether the rectification applied for was granted or not; but here the amendment applied for is for the very purpose of changing the deed, which at present, it is assumed, does not bar the entail, into an effective disentailing assurance.

In a later case of *Bankes* v. *Small* (1), where an action was brought to compel a tenant in tail to execute a disentailing deed pursuant to his contract, the effect of section 47 was again discussed, and Fry, L.J., says (at p. 730):—"I have come therefore to the conclusion that the true meaning of this section is to exclude all jurisdiction to treat as effectual in equity under

(1) 36 Ch. D. 716.

the Act, either on the ground of specific performance, relief against defective execution or non-execution of powers, or on any other ground, an assurance intended to operate under the Act which is not effectual under the Act."

Now, comparing this statement of Fry, L.J., with the observations which I have quoted from his judgment in *Hall-Dare* v. *Hall-Dare* (1), it seems to me to show that when the Court of Appeal laid down broadly in that case that the power of a Court of Equity to rectify a deed was not affected by the 47th section in the case of a disentailing deed, they had not present to their minds such a rectification in the form of a deed as would change a non-effective into an effective disentailing assurance.

In *Nelson* v. *Agnew* (2) it is laid down that a disentailing deed need not pursue any particular form of conveyance. Any deed which by its legal operation would have conveyed the fee-simple if the grantor had been seised in fee will, if executed by a tenant in tail in possession and duly enrolled, bar the entail. The question in that case did not arise upon the words of limitation in the *habendum*, but upon the description of the subject-matter of the grant; and the Master of the Rolls in giving judgment said (at p. 239):—"I think it right to add that I have construed the deed before me strictly according to the principles of the Common Law, and as if I were a Judge trying an ejectment on the title for these lands. I guard myself against being supposed to have drawn in aid any principle of equity to make the deed barring the entail bear a different construction from that which the principles of the Common Law would warrant."

Now, reading section 45 in the light of these authorities, the effect of the section seems to me to be this, that, while it does not take away the general jurisdiction of a Court of Equity to rectify a disentailing deed so as to bring its provisions into conformity with the actual intention of the parties, it does prohibit any Court from transforming, by the application of any equitable doctrine, a deed which, according to its legal construction, is ineffective to bar an entail, into a valid disentailing assurance. In this case, therefore, if the deed as it stands is not, according

(1) 31 Ch. D. 251. (2) I. R. 6 Eq. 231.

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to its true legal construction, sufficient at law to bar the entail, I cannot on any equitable ground insert the word "simple" after the word "fee," in order to make it an effective disentailing deed.

The question then remains whether the deed in its present form is an effective disentailing deed? The form of conveyance is this. Harry Crowe Godley conveys the rentcharge to James Lane to hold unto said James Lane *in fee* to the use of the said Harry Crowe Godley, *in fee-simple.* There can be no question but that that deed, prior to 1882, would have only passed a life estate to James Lane or to Harry Crowe Godley; and the question is, what is the effect of the deed having regard to the 51st section of the Conveyancing Act, 1881? The only decision so far as I know as to the effect of this section is that of Mr. Justice Joyce: *In re Ethel and Mitchell's and Butler's Contract* (1). In that case a mortgagee of a fee-simple estate, having been paid off, reconveyed the property unto the mortgagor to hold unto and to the use of the mortgagor *in fee.* The property having been afterwards sold, the purchaser objected to the title on the ground that the fee-simple did not pass by the reconveyance, and that the legal fee was still outstanding in the mortgagee. The purchaser issued a summons before Mr. Justice Joyce, to have the question decided, and the learned Judge held that the reconveyance was not sufficient to pass the fee-simple. The ground on which that decision is based as expressed in the judgment is this (at p. 949):—"Before the Conveyancing Act of 1881, however plain the intention might be as to the effect of a conveyance of freeholds, the deed could not operate as a grant of the legal estate in fee-simple without the word 'heirs.' Now, section 51 of the Conveyancing Act of 1881 provides, 'In a deed it shall be sufficient, in the limitation of an estate in fee-simple, to use the words in fee-simple, without the word heirs,' and I think that in the absence of the word 'heirs,' however plain the intention of the parties may be to pass the legal estate in fee-simple, this absence can only be compensated for by the actual insertion and use of the words 'fee-simple,' and, notwithstanding the decision in *Flight* v. *Lord Lake* (2), I am compelled to hold that to supply the word

(1) [1901] 1 Ch. 945. (2) 2 Bing. N. C. 72.

'simple' by construction from a consideration of the obvious intention as expressed in other parts of the instrument itself would not be a compliance with the terms of the Act."

Now nothing could be clearer or more precise than the terms of that decision, which was given after consideration; and if the provisions in the deed in that case were identical with those of the deed in this case, I would of course follow it. But there are several differences between the provisions of the two deeds that seem to me to be material. In that case there appears to have been nothing in the deed, outside the words of limitation themselves, showing the intention of the parties to convey the fee-simple except the fact that it was a reconveyance of the mortgaged estate by a mortgagee who had a mortgage of the fee-simple, and there were no other words of limitation except the limitation "unto and to the use of the mortgagor in fee." In this case we have on the face of the deed the fact that the deed is intended to be enrolled as a disentailing deed under the statute: we have the conveyance made "freed and discharged from the estate tail and all remainders, estates, and powers to take effect after the determination or in defeasance of the estate tail," and in addition to the limitation to James Lane in fee, we have the limitation "to the use of Harry Crowe Godley in fee-simple." We have, therefore, in this deed, outside the limitation "to James Lane in fee" not only clear evidence of an intention on the part of the grantor to pass by it the fee-simple, but also an actual limitation of the rentcharge to Harry Crowe Godley in fee-simple.

But then a difficulty arises from the Common Law rule that, in a deed operating under the Statute of Uses, the person to whom the use is limited cannot take a larger estate than that conveyed by the deed to the grantee to uses, and therefore, if the limitation to James Lane in fee only passes to him a life estate, the estate limited to Harry Crowe Godley would determine at the death of James Lane, and at the same date the deed would cease to be effective as a disentailing assurance. In order, therefore, that this deed may be a complete disentailing assurance barring the issue in tail during the continuance of the rentcharge, the limitation to James Lane in fee must be capable of being construed as a limitation to James Lane in fee-simple. Can I

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so construe it? There is a general canon of construction that deeds should be construed so as to give effect to the expressed intention of the parties, if it is possible to do so without infringing any rule of law. There is also another canon, that some effect should be given to every word in a deed if that can be done consistently with the rules of law and the expressed intention of the parties. If I construe this deed as giving only a life estate to James Lane, I give no effect whatever either to the words "in fee" in the limitation to him, or to the words "in fee-simple" in the limitation of the use to Harry Crowe Godley, and I defeat the plain intention of the parties to the deed. On the other hand, if I construe the words "in fee" as meaning "in fee-simple," I give effect to every word in the deed, I make it harmonious throughout, and I carry out the expressed intention of the parties. The words "in fee" are capable of several meanings. They may mean "in fee-simple" or "in fee tail." They have no technical meaning. Is there, then, any rule of law to prevent me from giving them that meaning which the parties using them intended them to bear? Take the case of a limitation in a deed to A for life, remainder to his first son and his heirs, remainder to the second, third, fourth, and other sons according to seniority and their respective heirs, remainder to the daughters of A, and their heirs. Now the limitation to the first son and his heirs would, according to its ordinary legal construction, give the first son an estate in fee; and, if so construed, all the remainders over would be void. Besides, the second and other sons to whom the remainders are given would, if alive, be heirs of the first son. In such a case therefore the Court, in order to carry out the obvious intention of the settlor, assumes that he used the word "heirs" in that limitation as meaning "heirs of the body," and accordingly inserts the words "of the body" after the word "heirs," not by amendment, but by construction, giving the first son only an estate tail, just as if the words "of the body" had been originally in the deed. There are many cases in support of this, but I need only refer to one: *In re Smith* (1).

In the same way it seems to me that I can, without infringing

(1) 27 L. R. Ir. 121.

any rule of law, interpret the words "in fee" where they occur in this particular deed as meaning "in fee-simple"; and accordingly construe the deed as if the actual limitation in the deed had been to James Lane "in fee-simple." Then the beneficial effect of section 51 of the Conveyancing Act comes into operation and makes the deed, which even when so construed would, before the Act, have only given a life estate, now sufficient to pass the fee-simple.

Solicitors for the trustees and Francis Godley: *Brown & Maunsell.*

J. E. W.

IN THE MATTER OF THE ESTATE OF JOHN STINSON AND THOMAS STINSON, OWNERS; MARGARET M'MUNN, PETITIONER.

Conversion of real estate—Sale for discharge of incumbrances—Surplus proceeds—Realty or personalty.

An order of the Court, rightfully made for the sale of real estate during the life of the owner, operates as a conversion from the date of the order, so that the proceeds are personalty; and after the death of the owner intestate, there is no equity for reconversion as between his heir-at-law and next-of-kin.

INCUMBRANCER'S PETITION FOR SALE.

The owner, at the time of the filing of the petition, was entitled to an estate in fee-simple in the lands, the subject of the petition. The absolute order for sale was made in the year 1893. The owner, Thomas Stinson, died intestate on the 30th June, 1908. The sale was completed in July, 1908, when the purchase-money was lodged in Court. The heir-at-law of Thomas Stinson claimed the surplus proceeds, amounting to £105, as realty. An application was made on his behalf, *ex parte*, to Ross, J., for payment to him of the said proceeds. The application was adjourned by the learned Judge, who required the next-of-kin of Thomas Stinson to be represented on the hearing of the adjourned appli-

Ross, J. 1909. *In re* STINSON'S ESTATE.

cation, no personal representative to Thomas Stinson having then been raised.

Hewitt R. Poole, for the heir-at-law :—

Section 64 of the Landed Estates Court Act enacts that the surplus purchase-money remaining after payment of costs, incumbrances, and charges, shall be paid to the owner; but here the money was not lodged till after the owner's death. In *In re Hall's Estate* (1) Monroe, J., following *Scott* v. *Scott* (2), decided that, in the case of the absolute order for sale of real estate, there is a conversion only of so much of the estate as may be necessary for the payment of incumbrances, and that the surplus purchase-money goes to the heir-at-law :- *In re Ross's Estate* (3). In *In re Owen's Estate* (4) Palles, C.B. (at p. 240), expresses the opinion that in the case of an estate which is more than sufficient to satisfy incumbrances, and over which a receiver has been appointed, it would be against right that the Court should, against the will of the owner, sell more of the estate than was necessary for the purpose of paying off the incumbrances. In *Richardson* v. *Nixon* (5) Lord St. Leonards held that the residue of the purchase-money, after paying off the mortgage, remained real estate. The contrary was laid down by Jessel, M.R., in *Steed* v. *Preece* (6); but in *Foster* v. *Foster* (7) Jessel, M.R., explained that all he decided in *Steed* v. *Preece* (6) was that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of conversion must follow, if there be no equity in favour of the heir or anyone else for reconversion. In *Jermy* v. *Preston* (8) Vice-Chancellor Shadwell held that, an excessive sale having been made under a decree for raising a sum, the surplus retained the character of real estate. In *Cooke* v. *Dealey* (9) Romilly, M.R., held that the surplus sum remaining after a sale in an administration suit was of the character of real estate, and passed to the heir. In *Hyett* v. *Mekin* (10) the Court sold the estate on the applica-

(1) 31 L. R. Ir. 416.
(2) 9 L. R. Ir. 367.
(3) 33 Ir. L. T. R. 21.
(4) [1897] 1 I. R. 260.
(5) 2 Jo. & Lat. 250.
(6) L. R. 18 Eq. 192.
(7) 1 Ch. D. 588.
(8) 13 Sim. 356.
(9) 22 Beav. 196.
(10) 25 Ch. D. 735.

tion of all the parties interested. There was, therefore, no equity for reconversion. *In re Grange* (1) was a sale by a mortgagee of the whole under the mortgagee's power of sale. That differs from a sale by incumbrancers, who sell only so much as may be necessary to pay the incumbrances.

Chadwick, for the next-of-kin of Thomas Stinson :—

Where, as in the present case, the claimants are equally volunteers, they must take the property as it stands, and there is no equity in favour of either the heir-at-law or the personal representative. It is admitted that the land was actually turned into money by the absolute order for sale : *In re Nixon's Estate* (2) ; *In re Hall's Estate* (3). The estate was rightfully sold by the Court : *Flanagan* v. *Flanagan* (4). It is immaterial whether the Court sells too much or not. If it sells, the proceeds are personalty : *Steed* v. *Preece* (5) ; *Hyett* v. *Mekin* (6) ; *Hartley* v. *Pendarves* (7) ; *In re Grange* (1) ; *Burgess* v. *Booth* (8). Section 64 of the Landed Estates Court Act provides that the surplus proceeds of the sale of lands which are the absolute property of the owner shall be paid to him as money.

Ross, J. :— June 7.

In this case the owner, at the time of the filing of the incumbrancer's petition, was entitled to an estate in fee-simple. The lands have been sold, the incumbrances paid off, and a sum remains in Court to the credit of the matter representing the surplus of the proceeds of the sale. The owner died intestate. His heir-at-law claims this money as representing realty. His next-of-kin claim it as personalty. On this elementary question of law there is a difference of opinion between the Courts in England and Ireland. It is essential that the point should be considered by the Court of Appeal and settled.

(1) [1907] 1 Ch. 313 ; [1907] 2 Ch. [20.
(2) Ir. R. 9 Eq. 7.
(3) 31 L. R. Ir. 416.
(4) 1 Bro. Ch. C. 498.
(5) L. R. 18 Eq. 192.
(6) 25 Ch. D. 735.
(7) [1901] 2 Ch. 498.
(8) [1908] 1 Ch. 880 ; on appeal— [1908] 2 Ch. 648.

ss, J. 09. In re SON'S ATE.

So far as this matter is concerned, there is no difference between this Court, which has a special jurisdiction, and any Court in which an action is brought to realize an incumbrance by the sale of the lands. The absolute order made in this Court is in effect the same as the ordinary decree, namely, that the land be sold, or a competent part thereof sufficient for the discharge of incumbrances and the costs of the proceedings. It is not practically possible to sell the exact amount required, so that in nearly every case of a solvent estate there is a surplus. Does this surplus retain its character of real estate, or is it to be treated as converted?

In *Richardson* v. *Nixon* (1) Lord St. Leonards stated his view that if more of the purchase estate was sold than was sufficient to pay off the mortgage upon it, the residue of the purchase-money would remain real estate.

In *Steed* v. *Preece* (2), Sir George Jessel laid down the very reverse, holding that if conversion is rightfully made, all consequences of conversion must follow, and that there is no equity of reconversion in favour of the heir. Both these statements must be taken as *obiter dicta* only.

Now, if the owner had lived, he would have received this money, because he combined in himself the two rights which on his death passed to his heir and personal representative respectively. He has not indicated any intention in the matter—there are no special circumstances in the case—the Court has now the money in its control, and in disposing of it must decide the pure question of law.

In *Scott* v. *Scott* (3), Vice-Chancellor Chatterton decided the question in favour of the contention of the heir-at-law.

The same view is taken by Mr. Justice Monroe in *Hall's Estate* (4). He says there is a conversion only of so much of the estate as may be necessary for the payment of incumbrances; the surplus will go to the heir-at-law. I have myself acted on this view up to the present.

I find that the very contrary has been decided by Kay, J., in

(1) 2 Jo. & Lat. 259.
(2) L. R. 18 Eq. 192.
(3) 9 L. R. Ir. 367.
(4) 31 L. R. Ir. 416.

Heyett v. *Mekin* (1) by Cozens-Hardy, M.R., in *Hartley* v. *Pendarves* (2); by Parker, J., in *Chadwick* v. *Grange* (3), which decision was approved by the Court of Appeal in England. Notwithstanding these decisions, Eve, J., in *Burgess* v. *Booth* (4) has followed the Irish Vice-Chancellor's decision in *Scott* v. *Scott* (5). His decision has been reversed by the English Court of Appeal, which expressed opinions entirely at variance with *Scott* v. *Scott* (5).

The matter cannot be allowed to rest in this unsatisfactory state. The point is occurring every day, and considerable sums of money may be paid out to the wrong parties. In this conflict of authority, and inasmuch as the case must go to our own Court of Appeal, I am free to express my own view.

Although more land was sold than was absolutely necessary, the surplus being in fact cash must be treated as cash unless there is an equity for reconversion.

The order of the Court for sale was a rightful order. It resulted in a cash surplus. There is no equity for reconversion as between the heir and the next-of-kin; both are volunteers. They must take it as they find it, and being personally unaffected by any trust, it must go to the next-of-kin. What I have stated is the argument that forms the basis of the English decision, and I see no answer to that argument. I accordingly declare that the next-of-kin are entitled.

As I am informed that a much larger sum is involved as between the same parties, I give both trustees their costs out of the fund, and I direct the heir-at-law to take the opinion of the Irish Court of Appeal.

I may add that my decision in *Scanlan's Estate* (6) and in *Scanton's Estate* (7) is unaffected by this decision.

D. M. S.

(1) 25 Ch. D. 735.
(2) [1901] 2 Ch. 498.
(3) [1907] 1 Ch. 313; [1907] 2 Ch. [20/
(4) [1908] 1 Ch. 880.
(5) [1908] 2 Ch. 648.
(6) [1897] 1 I. R. 462.
(7) [1898] 1 I. R. 157.

Appeal. 1909.

In re STINSON'S ESTATE.

Nov. 1.

The heir-at-law appealed (1).

Hewitt R. Poole, for the appellant, used the same arguments as those reported above.

Chadwick, for the next-of-kin, and *Carson*, for the personal representative, of Thomas Stinson, were not called upon.

THE LORD CHANCELLOR:—

We do not require to hear this case further argued. Our decision is founded upon this: we now find the very point involved in the appeal decided, if not by Sir G. Jessel in *Steed* v. *Preece* (2), by Kay, J., in *Hyett* v. *Mekin* (3), and by the full Court of Appeal in England—Cozens-Hardy, M.R., Fletcher Moulton, L.J., and Farwell, L.J., all eminent Judges, in *Burgess* v. *Booth* (4). On what principle could we, with any convenience, overrule the decision of the English Court of Appeal in that case? The question at issue might well have been decided originally the other way. I express no opinion at all as to that; we are guided in our present judgment by authority, and authority alone. The Irish decisions to which we have been referred are all based upon the judgment of Chatterton, V.-C., in *Scott* v. *Scott* (5), but that case has been expressly dissented from in England, and we cannot now follow it. The appeal must accordingly be dismissed.

PALLES, C.B.:—

I base my decision, as the Lord Chancellor has based his, on the ground of convenience. I state no general proposition upon the question involved in this case, but I consider that it would be a most inconvenient thing if, by now reversing the decision of Ross, J., we were to hold that different rules of law should apply in England and in Ireland, with regard to the devolution of property in such a case as the present. The law upon the present question

(1) In the Court of Appeal, before THE LORD CHANCELLOR, PALLES, C.B., and HOLMES, L.J.

(2) L. R. 18 Eq. 192.

(3) 25 Ch. D. 735.

(4) [1908] 2 Ch. 648.

(5) 9 L. R. Ir. 367.

appears to have been determined in this country by the decision of Chatterton, V.-C., in *Scott* v. *Scott* (1). Prior to that time, a contrary principle had been laid down in *Steed* v. *Preece* (2) by that great master of real-property law, Sir G. Jessel. It has often been said that that decision of Sir G. Jessel was a *dictum* merely; but that is not admitted by the Judges of the Court of Appeal in *Burgess* v. *Booth* (3). [His Lordship referred to the judgments in that case, and continued.]

If the matter were now *res nova*, I think a good deal could be said in favour of Mr. Poole's contention; but I am clearly of opinion that it would be most inconvenient for us now to differ from the established English practice, and I agree that this appeal should be dismissed.

HOLMES, L.J.:—

I agree. I offer no suggestion as to how I should have decided the case, were it not for the decisions in England, which have been referred to, and with which the decision of Ross, J., is admittedly in accordance.

Solicitors for the heir-at-law, and next-of-kin, of Thomas Stinson: *French & French.*

Solicitors for the personal representative of Thomas Stinson: *FitzGerald & M'Cormick.*

R. ST. J. C.

(1) 9 L. R. Ir. 367. (2) L. R. 18 Eq. 192. (3) [1908] 2 Ch. 648.

Barton, J.
1909.
Dec. 17.

In re KNOX, Deceased;

SNODGRASS *v.* GAMBLE.

Will—Charitable bequest of land—English charity—Death of testator within three months—Failure of gift—7 & 8 Vict. c. 97, s. 16.

A testatrix bequeathed all her property, of whatsoever nature and kind, to her executors, upon trust to sell same and convert into money, and out of the proceeds to pay debts and certain legacies, and to divide the remainder among certain charities, one of which was Dr. Barnardo's Homes in London. The only property applicable for the discharge of the charitable legacies consisted of a farm of land held under a judicial tenancy. The testator died within three months after making her will:—

Held, that the gift failed.

Boyle v. *Boyle* (I. R. 11 Eq. 433) followed. *In re Brown, Deceased; Brown* v. *Harrison* (35 Ir. L. T. R. 25) not followed.

Originating Summons.

Application on behalf of Andrew Snodgrass, executor of the will of Agnes Knox, deceased, for the determination of the question whether Dr. Barnardo's Homes, the Belfast Cripples' Home or Institution, and the Society for the Prevention of Cruelty to Animals were entitled to the residue or any part of the property dealt with in the will and codicil of said deceased. By testatrix's will, dated 6th May, 1909, she left all her property, of whatsoever nature and kind, to her executors, "upon trust to sell same, and convert into money, and out of the proceeds thereof" to pay debts and certain legacies. The will then provided that "the remainder of my property after the payment of my debts and the above-mentioned legacies is to be divided in equal proportions between the following institutions, viz.:—Dr. Barnardo's Homes, The Belfast Cripples' Home, and the Society for the Prevention of Cruelty to Animals." In a codicil dated 17th May, 1909, testatrix gave additional legacies, and added: "The legacies before mentioned are to be paid first out of my estate, and in all other respects I confirm my said will, and I direct that the legacies and bequests mentioned in my

previous will to the charitable institutions therein named shall abate in equal proportions, and be paid out of the residue of my estate." The testatrix died on 18th May, 1909, and probate was, on 14th July, 1909, granted to the applicant. The only property which could be applied to the payment of the charitable legacies consisted of the proceeds of a farm of land which testator had held as a judicial tenancy, and as to which she had entered into an agreement for purchase under the Irish Land Act, 1903. In affidavits filed in the matter it was stated that Dr. Barnardo's Homes had been incorporated under the Companies Acts, and that their registered office was in London, but that they had a receiving office in Belfast.

Horner, K.C., and *Gaussen, K.C.*, for the executor.

Ross Houston, for the charitable institutions:—

So far as Dr. Barnardo's Homes are concerned the gift is good, notwithstanding the death of the testator within three months. The words "for pious or charitable uses in Ireland," in section 16 of 7 & 8 Vict. c. 97, cannot affect a case where the charity, as in this instance, is an English one. To make the section apply, the words "in Ireland" must be transposed out of the actual order. *Boyle* v. *Boyle* (1) was decided on other grounds, and is otherwise distinguishable, but it is practically overruled in *Brown* v. *Harrison* (2), which governs this case.

T. Henry Maxwell, for the next-of-kin:—

Boyle v *Boyle* (1) is a direct authority in point. In *Brown* v. *Harrison* (2) *Boyle* v. *Boyle* (1) was not cited. However, in the present case it is not necessary to decide between these two cases, as Dr. Barnardo's Homes have a local branch in Belfast. Therefore, the gift might be applied to a charitable purpose in Ireland, and is consequently void.

J. H. Pigot, for the Commissioners of Charitable Donations and Bequests.

(1) I. R. 11 Eq. 433. (2) 35 Ir. L. T. R. 25.

Barton, J. 1909.

In re KNOX, DECEASED; SNODGRASS *v.* GAMBLE.

BARTON, J.:—

This summons raises a question upon the construction of section 16 of the Charitable Donations Act of 1844, which enacts that "no donation, devise, or bequest for pious or charitable uses in Ireland" shall be valid unless executed three calendar months at least before the death of the person executing the same. Do the words "in Ireland" apply only to the immediately preceding words, "pious or charitable uses"? or do they apply to the whole class of "donation, devise, or bequest for pious or charitable uses"?

In *Boyle* v. *Boyle* (1) the Vice-Chancellor, after argument, decided that the latter was the correct construction, and that it would be a very narrow construction of the section to hold that it was merely applicable to pious or charitable uses to be carried out in Ireland. In another case, *In re Brown, Brown* v. *Harrison* (2), the Vice-Chancellor is reported to have given a decision to the opposite effect. But it does not appear that he was reminded of *Boyle* v. *Boyle* (1).

If I have to choose between the two cases, I have no difficulty in electing to follow *Boyle* v. *Boyle* (1), which is in accordance with what I have always understood to be the law. The object of the section was not to prevent dispositions in favour of Irish charities as distinguished from English or foreign charities; but to prevent "the mischief of improvident alienations or dispositions by languishing or dying persons in Ireland." I hold these charitable gifts to be void, so far as the testatrix's lands are concerned.

Solicitor for the executor: *W. P. Moody.*
Solicitors for the charity: *Cleave & Fulton.*
Solicitor for the next-of-kin: *T. Elliott.*
Solicitors for the Commissioners of Charitable Donations and Bequests: *Maxwell, Weldon & Co.*

J. MAC M.

(1) I. R. 11 Eq. 433, 438, 432. (2) 35 Ir. L. T. R. 25.

In re LONGWORTH, Deceased; LONGWORTH *v.* CAMPBELL.

(1906. No. 775.)

M. R.
1906.
Nov. 13,
27.
1907.
May 16

Will—Construction of—Gift of realty and personalty to "A for life, and after his death to his issue"—Estate tail—Estate for life—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66)—*Land Law (Ireland) Act,* 1896 (59 & 60 *Vict. c.* 47), *s.* 32 (4)—*Devise of freehold registered land sold under Land Purchase Acts—Effect of Local Registration of Title (Ireland) Act,* 1891.

A testator bequeathed four farms of land held by him from year to year to trustees in trust for "A for his life, and after his death for his issue lawfully begotten." The testator afterwards purchased the fee-simple of two of the farms under the Land Purchase Acts, and was registered as full owner thereof under the Local Registration of Title (Ireland) Act, 1891 :—

Held, that A took an estate tail in the registered lands, and an estate for life in the lands held from year to year.

Freehold registered land sold under the Land Purchase Acts is real estate, and is subject to the ordinary rules of law as to the disposition of real estate, although it vests in the personal representative of the registered owner as if it were a chattel real, and (in the case of intestacy) the beneficial interest in it devolves as if it were personal estate.

The provision in section 32 (4) of the Land Law (Ireland) Act, 1896, that "an agreement for purchase, a vesting order, or fiat shall not operate to convert the interest of the purchaser into real estate," merely provides for and deals with the interval between (*a*) the agreement for purchase, vesting order, or fiat, and (*b*) the registration under the Local Registration of Title Act, 1891.

Originating Summons.

This was an application to determine certain questions arising on the construction of the will of William Longworth, deceased. The facts of the case were as follows :—

William Longworth at the date of his will was possessed of and entitled to four farms of land, viz.: (*a*) a farm and two gardens situate at Tubritt, Athlone, in the county of Westmeath, containing in or about 85 acres, and held from Colonel Stopford

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under a tenancy from year to year subject to the rent of £60; (*b*) a farm situate at Black Ories, Athlone, in the said county, containing in or about 41 acres, and held from the said Colonel Stopford under a tenancy from year to year subject to the rent of £27; (*c*) a farm situate at Ballinahown, Athlone, in the said county, and containing in or about 49 acres, and held from the late Charles O'Donoghue under a tenancy from year to year subject to the rent of £50; (*d*) a farm situate at Knockinea, Athlone, in the said county, containing in or about 34 acres held from Lord Castlemaine under a tenancy from year to year subject to the annual rent of £12.

William Longworth made his will dated February 10th, 1896. The material part of the will was as follows:—

"Whereas I am possessed of certain head-rents in the town of Athlone, amounting to the sum of £142 per annum, and am also possessed of four farms situate at Tubritt, Black Ories, Knockinea, and Ballinahown, under judicial leases, and a dwelling-house in which I now reside at Tubritt, aforesaid, together with certain furniture therein. Now, I hereby devise the aforesaid head-rents to the trustees of this my will in trust to pay the annual income thereof to my dear wife Margaret Anne Longworth during her life so long as she remains unmarried; and should she marry again, I direct that my trustees shall hold said rents in trust for my cousin Frank Longworth during his life, and after his death in trust for his eldest son lawfully begotten and his issue, and if my said cousin should die without male issue, then I devise and direct that the said rents shall go to my own right heirs. I also bequeath my said four farms to my trustees in trust for my said cousin during his life, and after his death in trust for his issue lawfully begotten. I direct that my wife, so long as she remains unmarried, shall have the right to reside in my said house at Tubritt, and that my sister Elizabeth Longworth shall also, if she desires, reside with her in my said house, and in the event of any dispute between them, I direct that my said trustees shall decide which of them, my wife or sister, is to occupy said residence, and I direct that so long as my wife resides therein she is to have the use of all the furniture and my silver plate at the Provincial Bank, Athlone, which in the event of her

marriage aforesaid is to pass to my said cousin. And whereas I am possessed of certain moneys at present invested in 4 per cent. stock of the Belfast and County Down Railways and on deposit receipt and current account in the Provincial Bank, Athlone, I direct that all my just debts shall be met thereout; and out of the residue I bequeath a sum of £60 to John Verschoyle Campbell thereout; and I further request my trustees to expend a sum of £40 in the purchase of a burial plot at Cornamagh cemetery, Athlone, and a sum of £50 on a marble reading-desk (similar to the lectern erected to my mother's memory) in St. Mary's Church, Athlone, same to be erected to my memory with a suitable inscription. All the residue of my estate, real and personal, I devise and bequeath to my said cousin Frank Longworth. I further bequeath to my cousin two gardens I hold at Tubritt, and I direct that he shall not relet or rent them, and that he shall hold them in the same manner as my aforesaid four farms. I direct that my cousin shall not mortgage or attempt to alien any of the lands or premises hereinbefore devised or bequeathed to him, and if he should do so, I direct that same shall pass to my own right heirs. On the death of my wife, I devise my aforesaid head-rents in trust for my said cousin Frank Longworth, or his issue, in manner similar to his succession to same in the event of my wife's marriage as aforesaid, and should he die unmarried or without issue, I devise the head-rents to my own right heirs; and I appoint Rev. Richard S. D. Campbell and Frank Longworth my executors and trustees."

William Longworth died on June 14th, 1900, and probate of his will was granted to the said executors on November 5th, 1900. After the date of his will and before his death William Longworth purchased under the Purchase of Land (Ireland) Acts the farms above referred to as (*a*) and (*b*), and the said farms were held by him at the time of his death in fee-simple subject to the respective annuities payable to the Irish Land Commission of £48 and £23 13*s.* 8*d.*, and he was duly registered as full owner of the said two farms under the Local Registration of Title (Ireland) Act, 1891. The other two farms above referred to as (*c*) and (*d*) were held by him at the time of his death under the yearly tenancies above mentioned. William Longworth left no children or

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remoter issue him surviving, and no brother or descendants of a brother. William Longworth had four sisters, three of whom married and predeceased him, namely, Mrs. Johnston, Gretta Parsons, and Sabina Skilleran, and one sister, the defendant Elizabeth Longworth, who was unmarried, and survived him. The eldest son of Mrs. Johnston was the defendant William Johnston, the eldest son of the said Gretta Parsons was the defendant Robert Parsons, and the eldest son of the said Sabina Skilleran was the defendant Frederick R. Skilleran. The said four defendants, William Johnston, Robert Parsons, Frederick R. Skilleran, and Elizabeth Longworth, were the heirs-at-law of the said William Longworth. The said Frank Longworth resided in England and was anxious to sell the said farms, as he was unable to manage them profitably. This summons was taken out by him accordingly to have the following questions determined—(1) Whether on the true construction of the said will the plaintiff took (*a*) an estate for life; or (*b*) an estate tail; or (*c*) an absolute estate, in all or any of the farms bequeathed to him by the said will.

(2) Whether, in the event of the plaintiff attempting to alien or sell any of the said farms, the defendants, William Johnston, Elizabeth Longworth, Robert Parsons, and Frederick R. Skilleran, would become entitled thereto, and if so, for what estate.

(3) Whether, if trustees of the said will for the purposes of the Settled Land Act were appointed by the Court, the clause in the said will against the alienation of the said farms would cease to be binding on the plaintiff, as being inconsistent with the power conferred on a tenant for life by the said Acts.

The defendants to the summons were the plaintiff's co-executor and co-trustee, the Reverend Richard Stewart Dobbs Campbell, and the above-mentioned four persons.

Denning, for the plaintiff:—

As to (1), I submit that the plaintiff took an estate tail in farms (*a*) and (*b*), and an absolute interest in farms (*c*) and (*d*). (*a*) and (*b*) were real estate, the testator having purchased the fee-simple, but (*c*) and (*d*) were held under yearly tenancies, and,

therefore, remained personalty. The words of the gift here to the plaintiff for life, and after his death for his issue, would give him an estate tail in real estate: *Woodhouse* v. *Herrick* (1); Fearne on Contingent Remainders, pages 249, 252, 255; Jarman on Wills, vol. 2 (5th ed.), pp. 946, 1258. That being so, the same words would give him an absolute interest in personal estate in accordance with the general rule that where personal estate is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail: see *Jordan* v. *Lowe* (2); *Harvey* v. *Towell* (3); *Parkin* v. *Knight* (4). The intention of the testator was that his lands, whether real or personal estate, should go together; and that intention should be given effect to by giving the words used the same construction as to both estates, as was done in *Dunk* v. *Fenner* (5). That case is not overruled by the subsequent cases: see *Herrick* v. *Franklin* (6); *Comfort* v. *Brown* (7); *Sheridan* v. *O'Reilly* (8); Jarman on Wills, vol. 2 (5th ed.), p. 1376.

As to (2), if the plaintiff has an absolute interest in the personalty, as well as an estate tail in the realty, the condition in respect of alienation is bad: Jarman on Wills, vol. 2 (5th ed.), p. 860. As to (3), if the plaintiff has only a life estate in the personalty, section 51 of the Settled Land Act, 1882, makes the prohibition against selling bad, and enables a sale to take place under that Act. Whether the direction in the will would affect his beneficial interest or income in the proceeds of sale is doubtful: Hood and Challis on Conveyancing and Settled Land Acts (4th ed.), p. 272.

Donaldson, for the defendants, Elizabeth Longworth and F. R. Skilleran, two of the co-heirs:—

The authorities show that, if this was a gift of personalty alone, the plaintiff would only take an estate for life: *Knight* v.

(1) 1 K. & J. 367.
(2) 6 Beav. 350.
(3) 7 Ha. 231.
(4) 15 Sim. 83.
(5) 2 R. & M. 557.
(6) L. R. 6 Eq. 593.
(7) 10 Ch. D. 146.
(8) [1900] 1 Ir. R. 386.

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Ellis (1); *Ex parte Wynch* (2); *Foster* v. *Wybrants* (3); *Sheridan* v. *O'Reilly* (4). If it is a gift of real and personal estate together, the same rule applies as to personalty, unless there is something to show that the personalty was to go in the same way as the realty. Theobald on Wills (6th ed.), p. 479. *Dunk* v. *Fenner* (5) is not good law if it lays down that where realty and personalty are blended the personalty goes as the realty: see *Herrick* v. *Franklin* (6). *Dunk* v. *Fenner* (5), however, did not intend to lay down any such rule, but turned on the construction of the particular instrument: see Jarman on Wills, vol. 2 (5th ed.), p. 1376, note (*c*). *Jackson* v. *Calvert* (7) is directly in point. Lord Hatherley says there:—"Except in a case where the personalty is either quite subordinate in value or a mere adjunct to the realty, it is very difficult to give any sound logical reason for the proposition, that an intention that the two kinds of property should go together ought to carry the whole in accordance with the rules applicable to realty rather than with those which would apply to a bequest of personalty alone. In the absence of any circumstances pointing in a contrary direction, it appears to be the more reasonable course to let one class of property go in one way, and the other in the other."

But it is submitted that there is no blended fund here, as the farms which were purchased by the testator under the Land Purchase Acts are to be regarded as personalty. If two of the farms were registered under the Local Registration of Title Act, 1891, in the testator's lifetime, they went as personalty, having regard to the provisions and intention of that Act. [He referred to sections 84, 86, and 89 of the Act.] If they were not registered until after his death, section 32 of the Land Act of 1896 applies, which provides—"(4) An agreement for purchase, a vesting order, or fiat, shall not operate to convert the interest of the purchaser into real estate."

I do not dispute that if the plaintiff is only tenant for life under the will the Settled Land Act applies, and that he can sell as

(1) 2 B. C. C. 569.
(2) 5 D. M. & G. 188.
(3) I. R. 11 Eq. 40.
(4) [1900] 1 I. R. 386.
(5) 2 R. & M. 557.
(6) L. R. 6 Eq. 593.
(7) 1 J. & H. 235.

tenant for life, but this would not apply to the house in which Elizabeth Longworth is given a right to reside, which would make her tenant for life of it: *In re Carne's Settled Estates* (1).

Michael Dunn, K.C., for the defendant, William Johnston, who was thought to be the heir-at-law.

A. E. Wood, for the defendant, R. S. Campbell.

Nov. 17.

THE MASTER OF THE ROLLS directed the case to stand over to have it ascertained how many of the farms had been registered.

Nov. 27.

When the case came on again, it was stated that the two farms (*a*) and (*b*) were registered in the testator's lifetime under the Local Registration of Title Act, 1891.

Dunn, K.C., referred to *Coltsman* v. *Coltsman* (2).

Donaldson:—

The fact of registration does not get rid of section 32 (4) of the Land Act of 1896. It says that a vesting order shall not operate to convert the interest of the purchaser into real estate, and there is nothing in the Act of 1891 to convert it. But even if it is converted, I submit that the rules as to personalty prevail. It is sought by the other side to apply a technical rule of law, namely, the rule in *Shelley's Case*. Section 85 (2) of the Act of 1891 provides for the abolition of all existing rules of law. This is not confined to the case of intestacy. Section 86 (2) provides that, registered land is to be administered as if it were a chattel real.

Denning, in reply:—

The registered land is real estate. Section 30 (1) provides that, on the registration of a person as full owner of land, an estate in fee-simple in the land shall be vested in the person so registered. The legal interest in freehold registered land devolves on the personal representative, notwithstanding any testamentary disposition, as if it were a chattel real: section 84 (1); but he holds it for the person entitled thereto as "heir, devisee, or otherwise":

(1) [1899] 1 Ch. 324. (2) L. R. 3 H. L. 121.

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section 87 (1). Section 85 (2) is limited to the case of the intestacy of the owner, and there is nothing to prevent an estate tail being created in registered land by will or by deed. The settlement by will of registered land is contemplated: section 84 (1). The expression "as if it were a chattel real" occurs again in section 86 (2), which provides for the administration of registered land. As to the meaning of "heirs," see section 89.

As to (3), the liberty to the widow to reside in the house does not make her tenant for life of it. In *In re Carne's Settled Estates* (1) the widow was given the right of exclusive occupation: see *In re Edward's Settlement* (2); *Herbert* v. *Freshfield* (3) (4).

1907. May 16.

THE MASTER OF THE ROLLS:—

On a careful, and I may say almost a microscopic, view of the provisions of the Local Registration of Title Act, 1891, I have arrived at the conclusion that its provisions, so far as they relate to the present case, are free from doubt and difficulty; in point of fact, they seem to me to be simplicity itself. The real and only difficulty in the case is occasioned by the provision in section 32 (4) of the Land Act of 1896. It is somewhat difficult to reconcile part of section 31 and section 32 (4) with other provisions of the Act of 1896, or with the Local Registration of Title Act, 1891. On reading section 31 (1) of the Act of 1896, which provides that "where any land has been sold under the Land Purchase Acts, as amended by this Act, . . . the sale of such land shall be discharged from all superior interests, as defined by this section . . . , and in every such case the land shall be vested accordingly in the purchaser in fee simple," one would say that there is no doubt that a vesting order made in pursuance of that section vested the land in the purchaser in fee simple; yet section 32 (4) provides that "an agreement for purchase, a vesting order, or fiat, shall not operate to convert the interest of the purchaser into real estate." I am of opinion that the true explanation of the section is that it provides, and only intends to

(1) [1899] 1 Ch. 324.
(2) [1897] 2 Ch. 412.
(3) [1902] 2 Ch. 679.
(4) The Master of the Rolls intimated that he would not answer questions 2 and 3.

provide for and deal with the interval between the agreement, vesting order, or fiat on the one hand, and registration under the Local Registration of Title Act, 1891, on the other. If that be the true construction of section 32 (4), all difficulties with regard to the provisions of the Local Registration of Title Act, 1891, disappear. If sections 22, 28, 30, 36, and 37 of the Act of 1891 are read together with the sections in Part IV. of the Act, beginning with section 83, it becomes demonstration that the intention was not to transmute real into personal estate; but, for the purposes and to the extent specified, to provide for the devolution of freehold registered land as if it were chattel real or personal estate. I emphasize the words "for the purposes and to the extent specified," because these words furnish a keynote to my judgment in this case.

Section 22 (1) provides that "from and after the commencement of this Act the registration of freehold land shall be compulsory when the land has been at any time sold and conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts, and is subject to any charge in respect of an annuity or rentcharge for the repayment of an advance made under any of the said provisions on account of the purchase-money." Section 28 states the classes of owners who may be registered. [THE MASTER OF THE ROLLS read the section.] Section 30 states the effect of registration. [THE MASTER OF THE ROLLS read sub-sections 1 and 2, and sub-section 3 to the words "subject as follows."] Sections 36 and 37 deal with the effect of transfer and the transmission of registered land from limited owner and on death. As I have said, when these sections 22, 28, 30, 36, and 37 are examined and read together with Part IV. of the Act, it becomes plain that land purchased under the Land Purchase Acts, and registered as freehold registered land, remains real estate, and that all the Legislature has done is to enact that certain rules of law applicable to real estate are altered and modified to the extent specified in Part IV. Part IV. is headed "Devolution of Interest in Freehold Registered Land sold under Purchase Acts." The first section of Part IV. is section 83, which provides that this Part of the Act shall apply to freehold registered land which shall have been at any time

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sold and conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts, and to no other land. Section 84 deals with the devolution of legal interest on death in freehold registered land sold under the Land Purchase Acts. [THE MASTER OF THE ROLLS read sub-sections 1 and 2.] It will be found that throughout the sections contained in Part IV. of the Act the Legislature is careful at every stage to negative the idea that freehold registered land bought and sold under the Land Purchase Acts is personalty or chattel real, or anything else but real estate, though it is to be dealt with as if it were chattel real in certain events, for certain purposes, and under certain conditions. Section 85, the marginal note to which is "Succession to *beneficial interest* in such land on intestacy," is important. [THE MASTER OF THE ROLLS read sub-section 1 and sub-section 2 to the word "dower."] It was contended before me that the provision in sub-section 2 abolishing as regards "such land" all existing rules of law, &c., applied not only to the case of the death of the registered owner intestate, but also to the case of a testamentary disposition of registered land by the registered owner. I am unable to give such a construction to the sub-section. If there was any ambiguity about this sub-section, it would be legitimate to refer to the marginal note I have read; but there is no ambiguity. The opening clause of the section, "On the death of a person intestate as to such land," governs the whole section. The section, in my judgment, applies only to cases of intestacy, and not to cases where the owner has made a testamentary disposition. The words "all existing rules of law" appear wider than necessary to effect the intention of the Legislature; but, having regard to the subsequent provisions of Part IV., it would be absolutely idle to suggest that the Legislature intended to abolish all existing rules of law relating or applicable to dispositions by will of a testator of his freehold registered land. It will be observed that the words of section 85 are "be divisible . . . *as if it were personal estate*," clearly showing that it remains real estate, although the beneficial interest devolves in the case of intestacy as if it were personal, which it is not. Section 86 contains provisions as to administration of such land. [THE MASTER OF THE ROLLS read sub-sections 1 and 2.]

Sub-section 3 enacts that "such land shall be administered as if it were personal estate." Then comes section 87 (Provision for registration of heir or devisee of such land), which is very important. Sub-section 1 enacts that "at any time after the death of the owner of any such land, his personal representatives may assent, in the prescribed form, to any devise contained in the will of such deceased person, or may transfer the land to any person entitled thereto as heir, devisee, or otherwise." Now, when you read sub-section 1 of section 86 together with this provision in section 87 as to assenting to a devise, having arrived at the conclusion that there is no transmutation of real estate into personal estate, how can any lawyer argue, or how could any judge decide, that a testator setting out to make his will dealing with land the subject-matter of Part IV., is not at liberty to give effect to his intention according to the settled rules which guide testators in dealing with real estate, whether it is or is not subject to the provisions of the Local Registration of Title (Ireland) Act? So far as the Act provides that the legal estate shall devolve on the personal representative (s. 84 (1)), and that in the administration of assets such land shall be administered as if it were personal estate (s. 86 (3)), so far as it provides that the beneficial ownership in the case of intestacy shall devolve as if it were personal estate (s. 85 (1)), and (to sum up) so far as may be necessary to give effect to Part IV., but no farther, are the rules of law or construction applicable to the will of a testator dealing with real estate altered or modified, in my opinion.

Now in the present case the owner of freehold registered land died, having made a will, and I have to construe it. The principles which I shall apply to the construction of it are those which would have regulated devises contained in the will of a testator if the Land Purchase Act of 1896, and the Act of 1891, had never been passed. I am dealing with the beneficial interest only. I have to decide and determine who are the persons by law beneficially entitled under the will of the testator to the lands mentioned in his will. The testator had four farms amongst other property, and at the date of his will these farms were held under judicial tenancies. In the interval between his will and his death the testator purchased one of them at all events (I take one for the purpose of

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illustration) under the Land Purchase Acts. The only certificate of registration I have before me is one relating to the lands of Tubritt, Athlone. The order of the Land Commission is dated January 16th, 1899, and vests the lands in the testator in fee-simple, subject to equities. The certificate is dated April 22nd, 1899. [THE MASTER OF THE ROLLS read the certificate]. William Longworth, being thus registered as owner of this farm, died on January 14th, 1900. The terms of the devise in the will relating to these farms is as follows: "I also bequeath my said four farms to my trustees in trust for my cousin Frank Longworth during his life and after his death for his issue lawfully begotten."

Plainly and beyond all doubt these words confer upon Frank Longworth an estate tail in so far as the farms consisted of real estate. Taking this farm of Tubritt as an illustration of the argument and of my judgment, I declare that Frank Longworth became entitled to an estate tail in that farm under, and by virtue of, the will of the testator. I believe that there is a second farm which stands in the same position as Tubritt, subject to the certificate of registration being handed in. I also in that case declare that Frank Longworth took an estate tail (1).

The remaining two farms continued to be held under judicial tenancies, and were not bought out under the Land Purchase Acts during the testator's life. As to these farms the question is, does Frank Longworth take an absolute interest in them or only a life estate? I am of opinion that he takes only a life interest. I do not say that the question is free from doubt, but I think that Mr. Donaldson's argument is sound, and that there is sufficient on the face of the will to justify me in deciding that as a matter of express intention the testator meant to give a life estate only to Frank Longworth, and did not intend to give to him the absolute interest in these two farms held under judicial tenancies. I shall refer very briefly to the authorities on this branch of the case. *Ex parte Wynch* (2), referred to by Sir Andrew Porter in *Sheridan* v. *O'Reilly* (3), established once

(1) The certificate was handed in. See Order, *post*, p. 37.—[REP.]

(2) 5 D. M. & G. 188.

(3) [1900] 1 I. R. 386.

and for all in my view that a gift of personalty to A for life and after his death to his issue was not, *per se*, a gift of an absolute estate to A. At page 389 of *Sheridan* v. *O'Reilly* (1) Sir Andrew Porter says:—"The rule that words, which in a will would confer an estate tail in realty, will give an absolute interest in personalty, is not strictly accurate in all cases; and the distinction is clearly settled, that whereas a devise of lands to one for life and after his decease to his issue gives him an immediate estate tail, the same words in a bequest of personalty only give a life interest to the first taker, the issue taking as purchasers. The origin of the distinction is that as to realty the rule is derived from the principles of land tenure, which have no direct application to personal property." Later on, Sir Andrew Porter quotes the following passage from *Ex parte Wynch* (2), where Lord Cranworth says (at p. 208):—"In all these cases the rule applied to real estates derived from the principles of tenure has been made the foundation of the rule for construing bequests of personalty, but in all either the technical words 'heirs of the body' have occurred, or there has been nothing to show that the words 'issue,' 'children,' or the like, have not been intended merely to define or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to the life estate, I am bound to act in the construction of the bequest of personalty on principles derived from laws of tenure, and not resting on intention. It was on this distinction that Lord Thurlow acted in *Knight* v. *Ellis* (3); there the testator directed certain rents to be accumulated till his grand-nephew should attain the age of twenty-one years, and after that event he gave the interest of that accumulated fund to his grand-nephew for his life, and after his decease he gave the fund to his issue male and in default of such issue to his (the testator's) three nieces; it was argued that as this would have been an estate tail in realty, it was an absolute interest in personalty; but Lord Thurlow held otherwise: he gave effect to the manifest intention, not thinking himself fettered by the

(1) [1900] 1 I. R. 386. (2) 5 D. G. M. & G. 188. (3) 2 Br. C. C. 570.

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analogy of real estate, when the result would have been arrived at on principles not founded on intention, but often operating in direct opposition to it. I cannot consider that case as having been overruled; I believe it to have been rightly decided; and at all events, if it was wrongly decided, I think it can only be questioned in the House of Lords."

There are at least two decisions in Ireland to the same effect. The only attempt made by Mr. Denning to get out of the decision in *Ex parte Wynch* (1) was based upon the case of *Dunk* v. *Fenner* (2); Mr. Denning admitted that that case was not free from doubt. Mr. Donaldson declared that it was not law, or, if it was, it was decided on special words. I accept the latter suggestion of Mr. Donaldson. I think that *Dunk* v. *Fenner* (2) may stand as an authority upon the particular will, but I cannot say that it can apply to the construction of this particular will. At all events if it was intended as a decision that where real and personal estate are blended, personal estate must follow the disposition of real estate and go as if it were realty, I dissent from the decision. But I dissent in good company. In *Jackson* v. *Calvert* (3) where there was a devise of real and leasehold estates together to A for life, and after his decease to the male issue of the body of A in equal shares and proportions, the leaseholds being the bulk of the property, Lord Hatherley, then Page-Wood, V.-C., held that A took an estate tail in the freeholds, and an estate for life only in the leaseholds. At p. 238 he says:— "Now, except in a case where the personalty is either quite subordinate in value, or a mere adjunct to the realty, as, for example, a leasehold garden held together with a freehold house, it is very difficult to give any sound logical reason for the proposition, that an intention that the two kinds of property should go together, ought to carry the whole, in accordance with the rules applicable to realty, rather than with those which would apply to a bequest of personalty alone. Instead of making the rule of construction as to personalty yield to the other, it would seem more relevant to adopt the principle of *Forth* v. *Chapman*. The whole difficulty arises from the artificial rules by which real

(1) 5 D. M. & G. 188. (2) 2 R. & M. 557. (3) 1 J. & H. 235.

estate is governed, and in the absence of any circumstances pointing in a contrary direction, it appears to be the more reasonable course to let one class of property go in one way, and the other in the other."

I can find no circumstance in this will to justify me in making a declaration that the personalty should go with the realty; certainly I have no evidence that these two farms formed and were merely an adjunct of the realty, or were quite subordinate in value. Accordingly my declaration will be that Frank Longworth took only an estate for life in the two farms which were not purchased out at the date of the testator's death.

Two further questions are asked by the summons.

As to the second (effect of alienation), I expressed my intention during the argument not to answer that question, and I adhere to that. As to the third question (the effect of the Settled Land Acts), I also decline to answer that question. The clause in the will is—"I direct that my cousin shall not mortgage or alien the lands, and if he do so same to pass to my own right heirs." My reason for not answering the question is, that the question of the power of selling or exercising the power of sale under the Settled Land Acts would involve the rights of a possible purchaser, and I do not think that it would be satisfactory to decide the question in his absence. I think that as regards the farm of Tubritt there is a good deal to be said in favour of Mr. Donaldson's argument as to the right of residence by the testator's widow and sister. If it be an exclusive right of residence which is given, the authorities are in favour of Mr. Donaldson's view, but the time to decide this point has not arrived. All parties are entitled to their costs out of the residue.

THE MASTER OF THE ROLLS made the following order :—

"THE JUDGE doth declare that, on the true construction of the will of the said William Longworth, deceased, and in the events that have happened, the plaintiff, Frank Longworth, became entitled to an estate tail in the farm and the gardens situate at Tubritt, Athlone, in the county of Westmeath, and in the farm situate at Black Ories, Athlone, in the said county, which were part of the assets of the said testator, William Longworth, subject, however, as to

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the said lands of Tubritt, to the provisions in the said will contained as to residence of the testator's widow and sister in Tubritt House; and the Judge doth declare that the said Frank Longworth is entitled to a life estate in the testator's two farms situate at Ballinahown and Knockinea, Athlone, in the said county of Westmeath; and the Judge doth not at present answer the other questions comprised in the said summons, and doth declare all the said parties entitled to their respective costs of this application and order, to be paid, when taxed and ascertained, out of the residue of the estate of the said testator William Longworth; and the Judge doth certify for counsel.

Solicitor for the plaintiff: *C. E. Fair.*
Solicitors for the defendants: *W. P. Kelly*; *P. Kelly.*

W. L.

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Nov. 22, 29.

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(1908. No. 1022.)

Vendor and purchaser—Conditions of Sale—"Outgoings"—R. S. C., 1891, *Forms, App. L, No.* 16—*Municipal rate—Poor rate—Apportionment—Collection of Rates* (*Dublin*) *Act*, 1849 (12 & 13 *Vict. c.* 91), *ss.* 51, 52, 74—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 51, 66—*Local Government* (*Ireland*) *Act*, 1900 (63 & 64 *Vict. c.* 63), *s.* 2.

The conditions of sale of property in the city of Dublin, sold by order of the Court, provided that all outgoings were to be paid by the vendor down to the 1st August, 1909 (the date fixed for the payment of the purchase-money):

Held, (1) that the poor rate was not apportionable, and that the vendor was liable to pay the entire rate struck for the year, from 1st April, 1909, to 31st March, 1910, although same was collectable in two instalments, on 5th May and 5th October, 1909.

(2) That having regard to the provisions of the Collection of Rates (Dublin) Act, 1849, the municipal rates, which were payable by instalments on the 5th May and 5th October, 1909, were apportionable.

SUMMONS.

The facts of the case were as follows:—

This was an action to administer the personal estate of Daniel Porter O'Connor, deceased. The plaintiffs were creditors

of the deceased, and the defendant, Elizabeth Callan, was his executrix. His property comprised houses in the city of Dublin, which, by order of the Court of May 10th, 1909, were directed to be sold in lots by auction, subject to conditions of sale to be settled by the Court.

Lot 2 consisted of houses and premises numbers 16 and 18 Hollybank Road, Drumcondra, held with lot 3 under lease dated 15th June, 1895, from George Fottrell to Daniel Daly, for a term of 500 years, from 1st November, 1894, at the yearly rent of £16 16*s.*, payable 1st May and 1st November, over and above all taxes, charges, and impositions whatsoever, except quit rent and Crown rent, and landlord's proportion of poor rate and income tax only excepted. The lot was to be sold subject to £8 8*s.* yearly, being one equal moiety of the said rent of £16 16*s.*, and indemnified against the other moiety by the premises comprised in Lot 3, which consisted of the houses and premises numbers 12 and 14 Hollybank Road, held under the said lease, subject to the said yearly rent of £16 16*s.*

Condition 7 (which was one of the ordinary conditions of sale contained in Appendix L, No. 16, to the Rules of the Supreme Court, Ireland, 1891) was as follows:—

"Each purchaser of lots 2 and 3 is, under a lodgment schedule signed by the Chief Clerk for that purpose, to pay the amount of his purchase-money (after deducting the amount paid as a deposit) into Court to the credit of this cause on or before the 1st day of August, 1909, and if the same is not paid, then the purchaser is to pay interest on his purchase-money at the rate of £5 per cent. per annum from the said 1st day of August, 1909, to the day on which the same is actually paid. Upon payment of the purchase-money in manner above mentioned the purchaser is to be entitled to possession, or to the rents and profits of said lots 2 and 3, as from the 1st day of August, 1909, down to which time all outgoings are to be paid by the vendors."

Joseph Brady became the purchaser of lot 2.

On closing the sale a question was raised by the purchaser's solicitor as to the outgoings which should be paid by the vendor. The usual practice in Court sales was to apportion the head-rent, rates and taxes, to the date named in the conditions, on which the

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purchaser was entitled to possession or receipt of the rents and profits. The purchaser's solicitor, however, contended that the vendor should bear the whole of the rates struck in respect of lot 2 by the Corporation of Dublin for the year commencing 1st April, 1909, to the 31st March, 1910. The total rates amounted to £22 15*s.*, being 10*s.* 6*d.* in the pound on £42, the combined annual value of the two houses, which were valued at £21 each. These rates were as follows:—Consolidated municipal rate at 7*s.* 3¾*d.*; public water rate at 3*d.*; library rate, 1*d.*; poor rate or collectable as such under the Local Government (Ireland) Act, 1888, viz.:—(1) poor rate at 2*s.* 2½*d.*; (2) police tax at 8*d.* The demand note signed by the collector, dated 5th May, 1909, served on the defendant, contained the following statement:—"Take Notice, that the undermentioned rates and taxes due by you for property in your occupation, or for which you are liable, from the 1st day of April, 1909, to the 31st day of March, 1910, became due and payable on the 5th day of May, 1909, and are payable in two equal instalments on the 5th day of May, 1909, and on the 1st day of October, 1909, and the particulars thereof are as follows, payment of which by the instalments above-mentioned I hereby demand." Then followed the particulars of the rates as above stated, and this statement:—"The poor-rate, or collectable as such, became due on the 5th day of May, 1909, and is payable in two instalments, on the 5th day of May, 1909, and 1st day of October, 1909, respectively." The vendor's solicitor suggested that the question of the apportionment should be settled by the Chief Clerk according to the usual practice; but the purchaser's solicitor insisting on his requirement, a summons was taken out on behalf of the plaintiffs, asking for a declaration that the above-mentioned rates, amounting to £22 15*s.*, were apportionable as an outgoing of the premises within the meaning of clause 7 of the conditions of sale, as between the vendor and purchaser, up to the 1st day of August, 1909, and for an order that the said rates might be accordingly so apportioned up to the 1st day of August, 1909.

The Hon. Cecil Atkinson, for the plaintiffs:—

By section 66 (1) of the Local Government Act of 1898 the poor rate is to be levied in the city of Dublin in like manner as

in the rest of Ireland. Section 51 (5) provided that the poor rate should be made twice a year, but that was amended by section 2 of the Local Government (Ireland) Act of 1900, which enacts that, notwithstanding anything in section 51 of the principal Act, the Council may make one poor rate for the whole financial year, and collect the same in equal moieties, one moiety for each half year. In *M'Dermott* v. *M'Morrow* (1) it was held under this section by the King's Bench Division that the person who is in occupation when the rate is struck is liable for the entire rate, although he quits occupation during the first half year, unless he can bring himself within section 2 of the Act of 1890 (53 & 54 Vict. c. 30). This case was followed by the Court of Appeal in *M'Daid* v. *Darragh* (2), a registry appeal. The question there, however, was as to the legal liability of the person in occupation when the rate was struck; here it is a question of the construction of the conditions of sale, and whether the rate having been made in moieties is not apportionable. The demand note here makes the poor rate payable in two instalments, in the same way and on the same days as the municipal rates.

W. J. Johnston, for the defendant :—

There is no express provision in the condition as to apportionment, but the condition itself imports an apportionment, and the settled practice at Chambers has been to apportion rates and taxes as between vendor and purchaser. In *Lawes* v. *Gibson* (3) there was a condition on a sale of leaseholds that all outgoings up to the 14th November, 1864, were to be cleared by the vendors; and it was held by Stuart, V.-C., that an apportioned part of the current rent from the last quarter day, up to the 14th November, was an outgoing, and must be allowed to the purchaser. Here the words are "down to which day all outgoings are to be paid by the vendor." If the contract contains no stipulation as to apportionment of outgoings, such outgoings can be apportioned between the parties as are apportionable at law: Williams on Vendors and Purchasers, vol. i., p. 457. The municipal rates, which form the bulk of the rates in question, are clearly apportion-

(1) 38 Ir. L. T. R. 200. (2) 43 Ir. L. T. R. 99; 3 Lawson, 304.
(3) I. R. 1 Eq. 135.

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able, having regard to section 74 of 12 & 13 Vict. c. 91, which provides for the apportionment on change of occupier during the period for which the rate is made. This section still applies to rates other than poor rate: *Farrell* v. *Ryan* (1), where it was held that an occupier of premises in Dublin was liable for poor rates struck within two years of suit, though his occupation commenced after portion of the rate sued for had accrued; but it was not disputed there that, by virtue of section 74, he was only liable for the portion of the municipal rates proportioned to the time he occupied.

Moles, for the purchaser:—

Jackson v. *Ross* (2) is an authority in favour of the purchaser. The condition of sale there provided that all outgoings would be discharged by the vendor up to the 1st November, 1896, and it was held by the Divisional Court that county cess applotted before that date, but not levied until after the execution of the conveyance, was payable by the vendor, as it became a charge on applotment and it became leviable on 1st September, 1896, and the fact that it was not actually levied till 1897 did not prevent it being a charge and so an outgoing included in the condition. Here the rates became due and payable at the time of the publication of the rates, although they were collectable in moieties. That does not affect the liability of the person who was in occupation at the date the rate was struck. There is nothing in section 52 of 12 & 13 Vict. c. 91 to the contrary. Section 74 of that Act deals with a different case, namely, when premises have been vacant for some time. Here the premises were occupied during the whole period. The first half of the poor rate has been paid, and it at any rate is not apportionable. *Lawes* v. *Gibson* (3) is not in point; it applies to rent only, and was decided before the Apportionment Act, 1870. That Act did not entitle a purchaser to obtain out of the purchase-money lodged by him the proportion of the head rent from the last gale day to the time of his purchase: *In re Keiller's Estate* (4).

(1) [1904] 2 I. R. 596.
(2) [1898] 2 I. R. 297.
(3) L. R. 1 Eq. 135.
(4) I. R. 6 Eq. 325.

Johnston, in reply:—

There was no condition of sale in *In re Keiller's Estate* (1), which was a case of a Landed Estates Court sale. There was no question of apportionment in *Jackson* v. *Ross* (2). The question there was whether under the conditions of sale the purchaser could get back the county cess which he had been obliged to pay. Section 74 of the Act of 1849 shows that the rates are apportionable at law, and therefore the statement in Williams on Vendors is correct.

Nov. 29.

THE MASTER OF THE ROLLS:—

The conditions of sale in this case were settled by the Court counsel, and submitted to myself personally for approval, and I am responsible for them. It was suggested that there was some defect in the conditions of sale applicable to the present case. I desire to point out that the 7th condition of sale is taken from the form of conditions of sale contained in Appendix L (No. 16) to the Rules of 1891, which will be found in Wylie's Judicature Acts, p. 1319. [THE MASTER OF THE ROLLS read condition 7 from the Form.] These are the ordinary conditions on a sale by the Court, and are always adopted, unless special reasons for altering them are brought to the notice of the Court counsel or the judge. No suggestion was made that I should adopt any special form in this case, or alter the phraseology which had been found sufficient for a number of years. Mr. Moles, who now appears for the purchaser, relied in support of his contention on *Jackson* v. *Ross* (2). The particular condition of sale there provided that all outgoings would be discharged by the vendor up to the 1st November, 1896, and that the purchase should be completed on the 22nd December, 1896. It was decided by the Queen's Bench Division that county cess applotted before the 1st November, but not levied until after the execution of the conveyance, was payable by the vendor. Andrews, J., who delivered the judgment of the Court, says, at p. 299 of the report:—"By the conditions of sale 'all outgoings were to be discharged by the vendor up to the 1st November, 1896.' Was this an outgoing at that date?

(1) I. R. 6 Eq. 325. (2) [1898] 2 I. R. 297.

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Clearly it was. It became a charge on applotment; and it became leviable on the 1st September, 1896. The fact that it was not actually levied till 1897 did not prevent it being a charge (and so an outgoing included in the 7th condition of sale), before that period." That decision is binding on me; and whether the word "outgoing" has up to this been deemed sufficient or not, it must be read in this Court in the light of that decision in cases which come directly within it, viz. cases of county cess. But in the case of municipal rates in the city of Dublin, which are collected under the provisions of the Collection of Rates (Dublin) Act, 1849 (12 & 13 Vict. c. 91), different conditions arise. It seems to me to be clear that sections 51 and 52 of that Act enabled the Collector-General, and since the abolition of that office, the Dublin Corporation, to direct that the rates to be collected and levied by virtue of that Act should be leviable by instalments. [THE MASTER OF THE ROLLS read sections 51 and 52.] When the Corporation acted on the provisions of sections 51 and 52, and directed that the rate should be payable by instalments, the second instalment did not become "leviable" within the meaning of the decision in *Jackson* v. *Ross* (1) till the date specified by the Corporation for payment of it. In other words, taking this demand-note before me, I hold that, though the rates are struck for the whole year, they are payable, that is, leviable, in two equal instalments on the 5th May, 1909, and the 5th October, 1909. It is clear that the Corporation could not distrain on the goods of any ratepayer for non-payment of the second instalment till after the 5th October, 1909. But, further, Mr. Johnston says that there is a broad distinction between this case and *Jackson* v. *Ross* (1). He refers to section 74 of the Act of 1849. I adopt his argument that there was no question of apportionment in *Jackson* v. *Ross* (1). There was no such provision to be considered as that contained in section 74.

The statement in Williams on Vendors and Purchasers, which has been cited, shows clearly the difference between the case where an apportionment is authorized by law and where it is not. I, therefore, think that under the provisions of the statute I have

(1) [1898] 2 I. R. 297.

mentioned I must hold in favour of the vendor and the conditions of sale, so far as regards the municipal rates payable on the 1st October, 1909, that same are apportionable, and that same should be apportioned, as between vendor and purchaser, in accordance with the settled practice at Chambers. But Mr. Moles must succeed to some extent in his application. The argument based on apportionment as to municipal rates disappears as to poor rate. There is no provision authorizing apportionment of poor rate. In the one case the Corporation is authorized by statute to make an apportionment. In the other there is no such provision. In *Farrell* v. *Ryan* (1) section 74 of the Act of 1894 was considered. Palles, C.B., there says at p. 599:—"It was argued that, admitting that the section remains unrepealed (which the objects of the Local Government Act plainly required, as it was to govern other city rates), still that section applied only to rates made under the authority of the Act of 1849, and that the poor rate for the City of Dublin made since the Local Government Act was made not under that Act, but under a different and inconsistent code. Whether this argument was sustainable is the question for decision." He then refers to the repeals in the Act of 1849 effected by the Local Government Act, 1898, and continues:—"Thus, before the Act of 1898, there were two distinct codes applicable to the making, levying, and recovering of poor rate in Ireland. One of these codes related to the city of Dublin, the other to the rest of Ireland. The Act of 1898 then does two things. First, it expressly repeals the first code, which consequently ceased to exist. Were nothing else done, there would not be any code for the making, levying, or recovering of poor rate in the City of Dublin. But then, secondly, it provides a substitute for that which it had repealed by expressly making applicable (by section 66) to poor rate in the City of Dublin the code which theretofore applied to the rest of Ireland, but not to the city of Dublin."

Mr. Atkinson has called my attention to the fact that the poor rate under the Local Government Act, 1900, is payable in two instalments; but it is impossible to get rid of the decision in *M'Dermott* v. *M'Morrogh* (2), followed by the Court of Appeal

(1) [1904] 2 I. R. 596. (2) 38 Ir. L. T. R. 200.

M. R. 1909.

BELFAST BANK v. CALLAN.

in *M'Daid* v. *Darragh* (1). It is collectable in two instalments; but the section of the Local Government Act, 1900, differs from sections 51 and 52 of the Dublin Rates Act, 1849, which provided that the Collector-General might determine that the rate should be collected and paid by instalments, and that, if he should so determine, the days on which the instalments became payable were to be published, and after such publication the rate was to be, and be deemed to be, due and payable. That means that the rate is not leviable until it has become due, and it only becomes due in Dublin on May 5th and October 1st in each year. Poor rate stands on an entirely different basis. It seems to me, then, reading *Farrell* v. *Ryan* (2) along with *Jackson* v. *Ross* (3) on the construction of the Act of Parliament, and of this 7th condition of sale, that the word "outgoings" must include the poor rate and the entire of it without apportionment. The vendor, in short, must pay the second instalment payable on the 1st October, 1910.

It will be necessary in future to alter the conditions of sale. Unfortunately these conditions have been interpreted by Court, by vendors, and purchasers alike, as meaning that all rates and taxes, including poor rate, shall be apportioned in respect of time down to the date mentioned in the conditions of sale. We have all acted on the view that all rates and taxes are apportionable in respect of time; but a blot is never a blot till it is hit, and even the Forms in the Appendix have no sacrosanct validity, and Mr. Moles deserves credit for having discovered a blot in the conditions of sale. I allow the costs of all parties to the summons.

Solicitors for the plaintiffs: *Hone & Falkiner.*
Solicitor for the defendant: *Wills C. Bennett.*
Solicitor for the purchaser: *C. M. Grimes.*

W. L.

(1) 43 Ir. L. T. R. 99; 3 Lawson, 304.
(2) [1904] 2 I. R. 596. (3) [1898] 2 I. R. 297.

In the MATTER of the ESTATE of JOHN STINSON and THOMAS STINSON, Owners; MARGARET M'MUNN, Petitioner.

Ross, J.
1909.
Dec. 13, 14.

Settlement—Rentcharge—Equitable estate—No words of limitation—Estate for life or in fee-simple—Intention.

By indenture of settlement, dated 15th October, 1808, the lands of B were charged with a perpetual rentcharge in fee. By indenture of marriage settlement, dated 1st September, 1858, the rentcharge was conveyed to a trustee, his heirs, executors, administrators, and assigns, in trust to pay the rentcharge to the wife during her life, and after her death to and amongst the child or children of the intended marriage, in such shares and proportions as she should appoint; and, if there should be no child or children of the intended marriage, to the general appointees by deed or will of the wife. There were no further limitations of the rentcharge:—

Held, that, there being sufficient indication of intention, there was no resulting use for the heir-at-law of the settlor, but that the children, on the death of the wife without appointing, took equitable estates in fee-simple in the rentcharge.

By indenture of settlement dated 15th October, 1808, the lands of Ballymeeny were charged with a perpetual rentcharge of £20 in fee. By indenture of marriage settlement dated 1st September, 1858, and made between Robert M'Munn of the first part, Margaret Ruttledge of the second part, and Rev. Edward Lowe as trustee of the third part, reciting that Margaret Ruttledge was possessed of the yearly rentcharge of £20 charged upon and payable out of the lands of Ballymeeny, reciting further that it had been agreed between all the parties that the said Margaret Ruttledge should convey and assign all her right, title, and interest in and to the said yearly rentcharge to the said Rev. Edward Lowe, in trust to pay the said yearly rentcharge to the said Margaret Ruttledge, during her life, and, after the death of the said Margaret Ruttledge, then to and amongst the child or children of said Margaret Ruttledge and Robert M'Munn, her said intended husband, in such shares and proportions as she, the

Ross, J.
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said Margaret Ruttledge, should by deed or will direct, limit and appoint, and, for want of such direction, then in such shares and proportions as he, the said Robert M'Munn, should by deed or will direct, limit, and appoint, and, if there should be no child or children of said intended marriage, then upon trust to such persons as the said Margaret Ruttledge should by deed or will appoint, it was witnessed that the said Margaret Ruttledge assigned, transferred and made over to the said Rev. Edward Lowe, his heirs, executors, administrators and assigns, the said annuity yearly rentcharge or annual sum of £20 charged upon and payable out of said lands of Ballymeeny, in trust to pay the said annuity to the said Margaret Ruttledge during her life, and after her death to and amongst the child or children of the said Margaret Ruttledge and Robert M'Munn, the said intended husband, in such shares and proportions as she, the said Margaret Ruttledge, should direct, limit, and appoint, and in default of such appointment in such shares and proportions as he, the said Robert M'Munn, should by deed or will, provided he survived his said intended wife, direct, limit, and appoint, and, if there should be no child or children of the said intended marriage, then upon trust in such manner and to such person or persons as she, the said Margaret Ruttledge, should by deed or will appoint.

The original of the settlement of 1858 was not now forthcoming. Robert M'Munn died in 1875. Margaret Ruttledge or M'Munn died in 1904, leaving seven children of the marriage, and without having exercised the power of appointment given to her by the marriage settlement.

By order dated 9th November, 1908, the said annuity or rentcharge was redeemed at the sum of £465. The examiner by his rulings on title having ruled that the children of Margaret M'Munn were entitled equally to the rentcharge, the eldest son of Robert M'Munn and Margaret Ruttledge or M'Munn now applied for an order declaring him to be absolutely entitled to the said sum of £465, subject to the life estates of the other children of the marriage.

H. R. Poole, for the applicant, the eldest son of the marriage:—

This being an executed deed, and no estate having been limited to the children, the most the Court can do is to imply a life estate in the children. This is not an express estate, but an estate by implication: *Casterton* v. *Sutherland* (1); *Lambert* v. *Thwaites* (2). If it is an implied gift, you cannot read in an estate in fee unless you have the proper words of limitation: *Re Whiston's Settlement* (3); *Champ* v. *Champ* (4) (*per* Gibson, J., at p. 86); *Sutton* v. *Sutton* (5); *In re Bennet's Estate* (6); Norton on Deeds, p. 329. In the cases where more than a life estate was held to be given, the provisions of the deed showed an intention to give an equitable fee: *In re Tringham's Trusts* (7); *In re Oliver's Settlement* (8); *Rodgers* v. *Houston* (9).

Where the estate is executed by the common law, you are not within the line of cases which decide that where the estate is executed by the Statute of Uses, you can give the estate intended to be given.

Chadwick, for the other children of the marriage:—

There is sufficient on the face of the deed to show that the intention was to give the children the entire estate. If the Court is against me on this, I ask the Court to insert in the settlement appropriate words to carry out the intention, giving the children vested interests in default of appointment: *Fitzgerald* v. *Fitzgerald* (10).

There is here an interest given to the children liable to be divested on exercise of the power of appointment. The gift over in case there should be no children shows that a complete gift was intended to be given to the children. A similar gift over was relied upon by Joyce, J., in *In re Tringham's Trusts* (7); and by Farwell, J., in *In re Oliver's Settlement* (8). If the intention of a deed be clear to pass an equitable estate in fee-simple, it is not

(1) 9 Ves. 445.
(2) L. R. 2 Eq. 151.
(3) [1894] 1 Ch. 661.
(4) 30 L. R. Ir. 72.
(5) *Ibid.* 251.
(6) [1898] 1 I. R. 185.
(7) [1904] 2 Ch. 487.
(8) [1905] 1 Ch. 191.
(9) [1909] 1 I. R. 319.
(10) [1902] 1 I. R. 477.

Ross, J. 1909. *In re* STINSON'S ESTATE.

necessary that the proper words of limitation should be used for the purpose: *Pugh* v. *Drew* (1). As to rectification *Fitzgerald* v. *Fitzgerald* (2); *In re Bird's Trusts* (3). The original of the marriage settlement having been lost, and there being only a copy, it is quite possible that the original may have contained the clause missing from the copy.

Poole, in reply:—

Farwell, J., had three things to support his decision in *In re Oliver's Settlement* (4)—(*a*) the direction to convey, (*b*) the power to advance, (*c*) the limitation over in default. Joyce, J., in *In re Tringham's Trusts* (5) founded his judgment on the case of *Pugh* v. *Drew* (1). In that case an absolute estate in a leasehold was clearly created, the settlement of the freehold was expressly made to correspond with the limitations of the leasehold so far as might be. It was a settlement by reference. On that ground it was held that the fee passed. There is no analogy between that case and the present case.

Ross, J.:—

This case has been well argued, and the authorities bearing upon the case have been so fully discussed that I need not reserve judgment.

The legal estate in the rentcharge here in question is vested in the trustee of the settlement upon the trusts declared concerning it, including a direction after the death of the wife to pay to and amongst the child or children of the marriage in such shares and proportions as the wife should appoint, and in default of such appointment in such shares and proportions as the husband should appoint, provided he survived the wife, and, in default of children, over. I look upon that as a trust for the children under which they take vested interests liable to be divested or altered by a valid exercise of the power of appointment. Although there is no express clause in the settlement in favour of the children of

(1) 17 W. R. 988.
(2) [1902] 1 I. R. 477.
(3) 3 Ch. D. 214.
(4) [1905] 1 Ch. 191.
(5) [1904] 2 Ch. 487.

the marriage in default of appointment, by the clause I have read, there is, until and in default of appointment, a vested interest given to the children. What is the nature of that estate? Mr. Poole has contended—(1) that in the case of a deed there can be no gift by implication whatsoever; and (2) that if a gift to the children can be implied, they can, in the absence of appropriate words of limitation, take life estates only. I cannot yield to this argument. This is a marriage settlement; a marriage settlement is executed, not merely for the maintenance of the husband and the wife, but to provide for the offspring of the marriage. In this particular case the children are, as I have said, expressly mentioned in the settlement, and given vested interests. But I consider, as did Joyce, J., in *In re Tringham's Trusts* (1), and Farwell, J., in *In re Oliver's Settlement* (2), that the words in the limitation over in default of issue are of great importance in the construction of this settlement. [His Lordship read the clause.] This limitation over shows that the settlor believed the former limitations to be complete, and that if there were children, the entire interest in the property should be vested in them. It is only in the event of their being no children that the express limitation over, conferring an absolute power of appointment on the wife, comes into operation. Under these circumstances the ordinary rule that equality is equity applies. I hold that the vested interest of each child was, not for a life estate only, but an equitable estate in fee, and accordingly so declare.

Solicitors for all the parties: *French & French.*

D. M. S.

(1) [1904] 2 Ch. 487. (2) [1905] 1 Ch. 191.

Wylie, J.
1909.
Nov. 30.
Dec. 14.

IN THE MATTER OF THE ESTATE OF COLONEL E. J. COOPER.

Land Purchase Acts—Limitations on advances—Purchase of Land Amendment Act, 1888 (51 & 52 *Vict. c.* 49), *s.* 2—*Advance exceeding* £3000—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 1 (1)—*Zones.*

Where the Estates Commissioners have deemed it expedient, for the purpose of carrying out sales on the estate of the same landlord, to advance more than the sum of £3000 for the purchase of a holding, which was subject to a judicial rent, and the full amount applied for comes within the limitations mentioned in section 1 (1) of the Irish Land Act, 1903, they are not entitled to consider whether the said holding is sufficient security for the amount applied for.

QUESTION OF LAW submitted for the decision of the Judicial Commissioner under section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—Andrew John Fox, being a judicial tenant, on the 1st November, 1905, entered into an agreement with the vendor for the purchase of his holding for the sum of £3675, and applied to the Land Commission for an advance of the said sum of £3675 for the purpose of enabling him to complete the purchase. The purchase annuity which would be payable in respect of said advance, if made, would be within the limits referred to in section 1 (1) of the Irish Land Act, 1903. On the 4th of March, 1909, the Estates Commissioners notified the vendor that they were not prepared to make an advance of more than £3215 in the case referred to. Subsequently the vendor's solicitors wrote to the Estates Commissioners asking the cause of the refusal to advance more than £3215. On the 23rd March, 1909, the Estates Commissioners wrote that, having regard to the circumstances of the holding, they did not consider it expedient to advance more than £3215, but that they had no objection to a cash payment being made by the tenant for the balance of £460, or any portion thereof.

When the matter came on for hearing on the 30th November, 1909, the Judicial Commissioner referred back the memorandum to the Estates Commissioners to state the circumstances which led them to arrive at this view. The following statement was accordingly added :—

The inspector of the Estates Commissioners reported with reference to this holding that, in his opinion, there was no reason for making an advance exceeding £3000, except the danger of upsetting the sale of the estate. The inspector's estimate of price was £3415 which included £200 for buildings, the property of the landlord, on which the tenant had been paying £8 as rent, included in the judicial rent of £150. The inspector recommended an advance of £3215, for which, in his opinion, the security would be good and sufficient, and that the tenant should be called upon to pay the difference in cash.

The following question was submitted : — Whether the Estates Commissioners, being prepared to advance a sum of more than £3000 for the purchase of the holding above referred to, are bound to advance the full amount applied for, such amount being within the limits referred to in section 1 (1) of the Irish Land Act, 1903, or are they entitled to exercise any discretion as to the amount which they are willing to advance?

G. Fetherstonhaugh, K.C., for the vendor :—

The only limitations in the Land Purchase Acts on advances, referred to in section 1 (1) of the Irish Land Act, 1903, are those prescribed by section 2 of the Purchase of Land Amendment Act, 1888. The latter section should be liberally construed : *Shaw* v. *Townshend* (1). Once the Estates Commissioners come to the conclusion that it is expedient to exceed £3000, then the mandatory provisions of section 1 (1) of the Irish Land Act, 1903, apply. The distinction between section 1 (4) of the Irish Land Act, 1903, limiting the maximum amount of an advance to £7000, and section 2 of the Purchase of Land Amendment Act, 1888, fixing £5000 as the maximum, is that the former subsection is confined to the case of the sale of a holding to which

(1) 34 I. L. T. R. 191.

Wylie, J. 1909. the Land Law Acts apply, while the latter section is not so confined.

In re COOPER'S ESTATE.

The Solicitor-General (*C. A. O'Connor, K.C.*), for the Treasury:

If it is held that the Estates Commissioners are bound to advance the full amount applied for, the consequences will be far-reaching. Section 1 of the Act of 1903 is subject to the limitations in the Land Purchase Acts on advances—*i.e.* the limitations mentioned in section 2 of the Act of 1888, subject to section 1 (4) of the Act of 1903. There is no distinction between the classes of cases coming within these respective limitations. There is nothing in section 1 to suggest that the Estates Commissioners are not entitled to exercise their discretion as to the amount, once they have exceeded the £3000 limit. The Estates Commissioners have not arrived at the affirmative opinion that they would be justified in making a larger advance than £3000.

Dec. 14. WYLIE, J.:—

I am clear as to the law. In cases within the zones, subject to the limitations in the Land Purchase Acts, the Estates Commissioners are bound to make the advance applied for. Now, the limitations in the Land Purchase Acts are £3000, £5000, and £7000. If the advance applied for exceeds £3000, the Estates Commissioners are not at liberty to give more than £3000 unless in their opinion the advance of such larger sum, not exceeding £5000, is expedient for the purpose of carrying out sales on the estate of the same landlord. I must assume that, in the present case, they have considered it expedient to exceed £3000, within the meaning of section 2 of the Purchase of Land Amendment Act, 1888. That being so, subject to the limitation as to £5000, being a zone case, they are bound to make the full advance applied for, and the question of security does not arise. It would, however, be open to them to consider the question of the advance on statutable grounds. But it is clear that once they consider it expedient on statutable grounds to exceed £3000, in a zone case they cannot enter into the question of security. They are absolved and prohibited by the statute from doing so.

Wylie, J. 1909.

In re Cooper's Estate.

I will alter the form of the question submitted to me, as follows:—"Whether the Estates Commissioners, having deemed it expedient, for the purpose of carrying out sales on the estate of the same landlord, to advance more than the sum of £3000 for the purchase of the holding above referred to, and the full amount applied for being within the limitations mentioned in section 1 (1) of the Irish Land Act, 1903, are entitled to consider whether the said holding is sufficient security for the amount applied for?"

My answer is "No."

Solicitors for the vendor: *Lett & Fetherstonhaugh.*
Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

Wylie, J. 1909. Dec. 7, 13.

In the MATTER of the ESTATE of THE CONGESTED DISTRICTS BOARD (formerly GEO. E. BROWNE).

Land Purchase Acts—Congested Districts Board—Purchase of estate including a town—Re-sale—Advances by Land Commission—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *ss.* 79, 80.

The provisions of the Land Purchase Acts which enable the Land Commission to make advances under said Acts to tenants for the purchase of their holdings are applicable to cases of agreements by tenants for the purchase, by means of advances under said Acts, of holdings consisting only of houses and premises occupied and used for trading purposes, and situated in a town which forms part of an estate purchased by the Congested Districts Board, under sect. 79 of the Irish Land Act, 1903, provided such tenants are in occupation.

Where applications for advances are made by tenants so circumstanced, under sect. 80 of the Irish Land Act, 1903, and the necessary certificate is given by the Congested Districts Board, the Land Commission are, by that section, absolved and prohibited from inquiring into the character of the holdings, or the sufficiency of the security, and the advances applied for must be made.

The powers of the Congested Districts Board to purchase land, and their position with reference to the Land Purchase Acts and Land Purchase Fund in respect of land purchased by them, considered.

Wylie, J. 1909.

In re CONGESTED DISTRICTS BOARD' ESTATE

QUESTIONS OF LAW submitted by Mr. Commissioner Lynch.

The facts upon which the questions arose, as stated in the judgment of Wylie, J., were as follows:—

The Congested Districts Board purchased an estate under the 79th section of the Act of 1903 for £26,829, and said estate was vested in them by order of the Estates Commissioners, dated the 30th July, 1906. The estate comprised ten townlands, or parts of townlands, containing 2787 acres, and included the town of Kiltimagh, with a population of 900, and in which, according to the Census of 1901, there were 197 inhabited houses. The tenement valuation of the town was £971, of which £948 was on buildings. The originating statement, filed for the purpose of the resale of the estate, was lodged on the 15th July, 1907, and included all the lands vested in the Board by the order of the 30th July, 1906, and the Board had since proceeded to resell the estate to the occupying tenants, by means of advances under the Land Purchase Acts. Amongst the agreements lodged were seventy-nine which comprised houses and premises in the town of Kiltimagh, all of which, with the exception of fourteen, were held under leases for long terms of years, six [illegible] being for leases for 999 years, made by the previous owner. The [illegible] held plots ranged in size from 6 perches to 1 rood 12 perches, while none of those held from year to year were under 4 perches. The total rental of these holdings was £157 6*s.* 2*d.*; the purchase-money £4762, and the annuities £153 7*s.* 2*d.*, almost the same as the existing rents: the average purchase rate being thirty and one-third years' purchase. The occupants of these premises carried on various trades, including that of publican, grocer, draper, butcher, baker, carpenter, and blacksmith. Some of the houses were sublet, and occupied by persons carrying on some of these trades, or by artizans or labourers, and in one case by a solicitor.

The following questions were submitted:—

1. Do the provisions of the Land Purchase Acts which enable the Land Commission to make advances under the said Acts to tenants for the purchase of their holdings extend, or are they applicable to cases of agreements by tenants for the purchase, by means of advances under the said Acts, of holdings consisting only of houses and premises, occupied and used for trading pur-

poses, and situate in a town which forms part of an estate purchased by the Congested Districts Board, under section 79 of the Act of 1903?

2. Are the provisions of section 80 of the Act of 1903 mandatory on the Land Commission with respect to the sanction of advances, except to the extent that the Land Commission are not to refuse to sanction the advance applied for on the ground of insufficiency of security, when the Congested Districts Board certify that the land comprised in an agreement for sale is, in their opinion, sufficient security for the repayment of the advance applied for?

W. M. Jellett, K.C. (with him, *A. B. Babington*), appeared for the Estates Commissioners.

The Solicitor-General (*C. A. O'Connor, K.C.*) (with him *Dudley White*), for the Treasury:—

The section of the Act of 1903 dealing with the purchase of land by the Congested Districts Board is section 79. In section 6 of the same Act no distinction is drawn between town tenants and other tenants. The three-fourths in number and rateable value of tenants mentioned in the section embraces both classes of tenants. That shows that the Estates Commissioners have power to purchase an estate comprising town-holdings; and it has been so held in *King-Harman's Estate* (1). Section 82 (1) of the Act draws no distinction between the different classes of tenants, *i.e.*, between tenants of agricultural and pastoral holdings, and of town holdings. The question that arises is—have the Estates Commissioners power to make advances to tenants of non-agricultural or non-pastoral holdings? In *Taffe's Estate* (2) it was held that section 10 of the Act applies to the Congested Districts Board: see notes to section 10 of the Act of 1903, in Walker's Land Acts, at p. 32. From section 11 of the Act of 1891 it would appear that it was intended to confine the operation of the section to agricultural and pastoral holdings. Section 40 of the Act of 1896 expressly limits the class of holdings to which the

(1) 38 Ir. L. T. R. 102. (2) 39 Ir. L. T. R. 214.

Wylie, J. 1909.

In re CONGESTED DISTRICTS BOARD'S ESTATE.

section applies. Neither the Estates Commissioners nor the Congested Districts Board can sell to tenants unless they are in occupation of their holdings. They have only power to sell the fee-simple. There is nothing in the Act of 1903 giving the Board the jurisdiction which the Estates Commissioners have under section 15. With regard to section 80, the only reasonable construction is that the Estates Commissioners are to have power to make inquiries in order to see whether the particular case comes within the provisions of the Act. If this were not so, they might be acting *ultra vires*.

A. C. Meredith, K.C. (with him *E. Coll*), for the Congested Districts Board:—

It is clear that the Land Purchase Acts apply to holdings other than agricultural or pastoral, or partly so. The Congested Districts Board have power to buy "land," and to resell anything they buy to a tenant. They are not bound by the limitations imposed by section 10 of the Act of 1903. With regard to the question of whether the tenant must be in occupation, the Board have wider powers of sale than any other body; see section 39 of the Act of 1891, and section 2 of the Act of 1903. Under the latter section the Board are expressly made "landlords." Occupation may be actual or constructive, subject to this, that you cannot have constructive occupation if the whole holding is sublet. Section 4 of the Act of 1888 implies that the Land Commission ought to make an advance in such a case, and gives them power to impose terms. Under section 80 of the Act of 1903 the duties of the Land Commission are merely ministerial. Questions as to occupation are expressly excluded by the section. The effect of sections 80 and 81 is to put the Board in a different position from any ordinary landlord. It was never intended that the Land Commission should have power to inquire into the nature of contracts entered into by the Board. The only sales the Board have power to carry out are sales under the Land Purchase Acts. The wording of section 75 of the Act of 1903 is peculiar. The section was inserted in order to obviate friction between the Land Commission and the Board, by preventing the Land Commission from supervising the Board. It was natural that it should be left to the Board to decide the question as to the propriety of the

persons to whom they would sell. The effect of section 80 is to make it mandatory on the Land Commission to make the advance applied for to the person purchasing, provided the certificate mentioned in the section is given.

WYLIE, J.:—

In this case Mr. Commissioner Lynch has submitted for my determination two questions of law arising upon the following facts [His Lordship stated the facts as above set out].

Before answering these questions, I think it is necessary to consider what are the powers of the Congested Districts Board as to purchasing land, and what is their position with reference to the Land Purchase Acts and Land Purchase Fund in respect of land purchased by them.

In *King Harman's Estate* (1) the Master of the Rolls, while sitting in this Court, decided that the Estates Commissioners could, under section 6 or section 7 of the Act of 1903, purchase an estate including town tenancies, and declare such estate to be a "separate estate" for all the purposes of the Land Purchase Acts; the only limitation upon their power so to purchase being that contained in section 10 of the Act, that no estate shall be purchased by the Land Commission which is not in the main agricultural or pastoral. In *Taffe's Estate* (2) the Master of the Rolls also decided that the Congested Districts Board, in buying an estate from the Land Judge under the provisions of sections 77 and 7 combined, had the same power as the Land Commission to buy an estate, including a town, and were subject to the same limitation under section 10. Now, I have read the judgment in that case with great care, and a strong desire to find my way to an agreement with everything laid down in it; but I confess I find great difficulty in applying the provisions of section 10 to the Congested Districts Board. Its words are these—"No estate shall be purchased by the Land Commission which is not in the main agricultural or pastoral." That section expressly applies only to the Land Commission, and it does not seem to me to be referred to or incorporated in section 77, either by itself or

(1) 38 Ir. L. T. R. 102. (2) 39 Ir. L. T. R. 214.

Wylie, J. 1909.

In re CONGESTED DISTRICTS BOARD'S ESTATE.

through the medium of section 7. It seems to me that section 77 does not either extend or restrict the then existing power of the Congested Districts Board to purchase an estate from the Land Judge. That section must be read in the light of section 1 of the Congested Districts Board (Ireland) Act, 1899, which provides, "that where the Congested Districts Board make an offer to the Land Judge for the purchase of an estate for the purpose of selling the same to the tenants thereon, the provisions of section 40 of the Act of 1896 shall be suspended, unless and until the offer is refused or withdrawn."

That being the law prior to 1903, section 77 provides "that for the purpose of the purchase by the Congested Districts Board of an estate from the Land Judge, the provisions of this Act with respect to the powers and duties of the Land Judge, in relation to an offer by the Land Commission, shall apply with the substitution of the Congested Districts Board for the Land Commission." That section does not appear to me to affect in any way the powers, duties, or limitations given to, or imposed by statute on, the Congested Districts Board, but merely extends to a purchase from the Land Judge by the Congested Districts Board certain powers and duties conferred and imposed upon the Land Judge by section 7, which did not apply to such a purchase under section 1 of the Congested Districts Board Act of 1899. I cannot find in any of the sections of the Act of 1903, relating to the Congested Districts Board, anything that extends or limits their previously existing powers to purchase land.

The powers and duties of the Congested Districts Board, and the purposes for which they can purchase land, are laid down in section 2 of the Congested Districts Board Act of 1893, by which they are for the first time given power to acquire land directly. That section provides that "the Congested Districts Board for Ireland may acquire land for the purposes of Part II of the Purchase of Land (Ireland) Act, 1891, and of enlarging small holdings in a congested districts county, and shall be landlords of all land so acquired within the meaning of the Land Purchase (Ireland) Acts, 1870 to 1891." Now, that section seems to me to define very clearly the powers, with their limits, of the Congested Districts Board to acquire land, and their position with respect to

the land so acquired in relation to the Land Purchase Acts. Up to 1896, when the Congested Districts Board purchased land, they paid for it out of their own funds. Then we come to the Act of 1896, and by section 43, sub-section 1, of that Act, "where the Congested Districts Board have agreed to purchase land, whether in a congested districts county or elsewhere, the Land Commission, on a request from the Board, stating the congested district county for the benefit of which the land is purchased, and the amount of the purchase-money, shall, subject as in this section mentioned, advance the purchase-money to the Board"; and, by sub-section 2, the advance shall not be made if it exceeds a certain limit. A further restriction on making an advance was imposed by section 3 (1) of the Congested Districts Board Act, 1899; but the above provisions of the Acts of 1896 and 1899 have been repealed by the Act of 1903. The Congested Districts Board Act, 1901, enacts certain provisions for facilitating resales of land by the Congested Districts Board, by enabling them, on a request of three-fourths in number and rateable value of the tenants of holdings on the estate, to determine any tenancy on the estate by a six months' notice.

Now, pausing for a moment, before we come to the Act of 1903, to consider the effect of the previous legislation. What does it show? It shows that what the Congested Districts Board are empowered to purchase, and what they can require the Land Commission to advance the money to pay for, is "land"; and there can be no doubt that "land" includes houses and tenements whether in town or country. There is nothing that I can find in any of the Acts to restrict the purchases of the Congested Districts Board to agricultural or pastoral land.

Then it may be asked, Are there no limitations to the powers of the Congested Districts Board to buy land? I think there are. They are laid down in section 2 (1) of the Congested Districts Board Act of 1893, to which I have referred. By that section they are only empowered to acquire land for the purposes of Part II of the Act of 1891, and of enlarging small holdings in a congested districts county; and by section 43 of the Act of 1896, they must, in order to claim an advance from the Land Commission, state the congested districts county for the benefit of which it is

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purchased. It is difficult to see how the houses in the town of Kiltimagh can be used for the purpose of the amalgamation or enlargement of holdings, or the migration of tenants in a congested district, or for any of the purposes mentioned in Part II of the Act of 1891. But if it was a matter of paramount importance for any of the said purposes that the Congested Districts Board should acquire the large estate surrounding or adjoining the town of Kiltimagh, and if that estate could not be acquired without purchasing the town, it may very well be that the purchase of the town, under such circumstances, would be a proper step to be taken by the Board within the meaning of section 39 of the Act of 1891. If the Board were entitled to purchase the town in this case, one curious result follows, that at the request of three-fourths in number and rateable value of the tenants on the surrounding estate, every one of the twenty-nine public-houses in this town might be closed by the Board in six months. But, be that as it may, it seems to me that, under the Acts prior to 1903, if the Congested Districts Board had purchased land, including a town, for the benefit of a congested district county, and applied to the Land Commission for an advance of the purchase-money, the Land Commission would, subject to certain limitations as to amount, have been bound to make the advance. The Land Commission could not, in my opinion, have raised the question, or at all events, could not decide the question, whether, apart from such limit, the particular purchase was within the powers of the Board. Whether the Land Commission could, at that stage, stay their hand pending the decision of that question in a proper proceeding, I am not in this case called upon to decide.

Coming now to the Act of 1903, section 72 provides that the sums required by the Congested Districts Board for advances for the purchase of land shall be paid to them out of the Land Purchase Fund. This provision, like that in the Act of 1896, is, I think, mandatory, subject to certain limitations. Then section 79 provides for the mode in which a purchase by the Board is to be carried out under the new Act. Under this section the purchase of the estate in this case has been carried out, the lands vested in the trustees of the Board, and the purchase-money advanced; and no question, it appears to me, can

be raised now by the Land Commission as to the propriety of the purchase of any part of the estate.

That being so, we have now to consider the question of sales of these lands by the Congested Districts Board and advances by the Land Commission to purchasers from the Board. At present no part of the advance in the case is charged on the purchased lands. It is only a charge at present on the funds of the Board, and the question I have to determine is substantially this, whether the Congested Districts Board can, through the medium of sales, compel the Land Commission to charge portions of the advance on the several houses in the town of Kiltimagh so as to have the advance in part repaid by purchase annuities charged on these houses?

The contention of the Board is based on section 80 of the Act of 1903. This section provides that "where an application is made to the Land Commission for an advance under the Land Purchase Acts to a person purchasing any land from the Congested Districts Board, and that Board certify that the land is, in their opinion, sufficient security for the repayment of the advance, the Land Commission shall sanction the advance." Now, the Board contend that the effect of that section is to make it mandatory on the Land Commission to make the advance applied for to the person purchasing, no matter whether the applicant for the advance is a tenant on or a stranger to the land, and no matter what may be the character of the land purchased, provided the certificate specified is given. But that construction of the section seems to me to be wholly inconsistent with sect. 7 of the Act, which provides that "where the Congested Districts Board purchase land for the benefit of a congested districts county, they may sell under the Land Purchase Acts any parcels thereof which are not required for tenants of holdings in that county to any tenants or proprietors of holdings, not exceeding £5 in rateable value, on an estate adjacent to, or in the neighbourhood of, that land, or to any sons of such tenants," and, "the provisions of this Act with respect to the application of the Land Purchase Acts to parcels of land shall apply in the case of the sale of any such parcel." Now, what was the necessity for this section, if, as the Board contend, they can sell under the Land Purchase Acts to any

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person any part of the land? In my opinion, the key to the whole difficulty is to be found in section 2 of the Congested Districts Board Act, 1893, already referred to, which provides that the Congested Districts Board shall be *landlords* of any land acquired by them within the meaning of the Land Purchase Acts. Then the Congested Districts Board Act, 1894, section 1, provided that where the Congested Districts Board sell land to a tenant, and the Land Commission make an advance for the purchase of such land, the Board may give certain guarantees for the payment of the purchase annuities in lieu of the guarantees then provided, by guarantee deposit and otherwise, in case of other sales. Then section 43 of the Act of 1896, after providing, as already mentioned, that the Land Commission should advance to the Congested Districts Board the purchase-money of land required by them, by sub-section 4, provided that "where the Land Commission make an advance to a tenant for the purchase of his holding from the Congested Districts Board, the amount of the advance shall be written off the debt due from the Board for the advances made to them"; and section 44, sub-section 6, of the same Act, enabled the Land Commission to make an advance under the Land Purchase Acts to the occupier of an amalgamated holding purchased from the Congested Districts Board, as if such occupier was in occupation of the whole of such holding under a contract of tenancy.

Then, coming to the Act of 1903, we find that section 75 enables the Congested Districts Board, under certain conditions, to sell parcels of their purchased lands under the Land Purchase Acts; and, by section 76, an advance of a limited amount may be made to a vendor on a resale to him by the Congested Districts Board.

Thus, it appears to me that, apart from section 80 of the Act of 1903, the Congested Districts Board, in respect of land acquired by them, is in the same position with reference to the Land Purchase Acts as any other landlord. They can therefore sell under the Acts, like any other landlord, to occupying tenants of holdings, or to purchasers of "parcels" to which the Acts apply; and it appears to me that what they cannot sell under the Acts they can sell for cash. This appears to be the view upon

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which Rule 26 of the Treasury Rules and Regulations of the 14th April, 1905, is based.

The only question remaining is, whether a town house is a holding in respect of which an application for an advance under the Land Purchase Acts can be made, within the meaning of section 80 of the Act of 1903? There can be no question, I think, that the primary object of the Land Purchase Acts was the transfer of the fee of agricultural and pastoral land from landlords to occupiers. Still, it is quite clear, from section 58 of the Act of 1881, and section 34 of the Act of 1887, that the Legislature has carefully prevented the exclusion of holdings of any kind from the Land Purchase Code. In my opinion, town holdings are not excluded from the Land Purchase Acts; and an application might legally and properly be made by a tenant in occupation of a town house for an advance under those Acts. Therefore, where such an application is made under section 80, and the necessary certificate is given, I think the Land Commission are, by that section, absolved and prohibited from inquiring into the character of the holding, or the sufficiency of the security, and the advance applied for must be made.

I will, therefore, answer the first question in the affirmative, with the qualification, "provided the tenant is in occupation."

Both in *King-Harman's Estate* (1) and *Walter's Estate* (2) the Master of the Rolls made it quite clear that, in his opinion, no advance could be made to a middleman or to an occupying weekly tenant under the Land Purchase Acts, and in that opinion I fully concur.

The second question I answer also in the affirmative, with this qualification, "provided the applicant for advance is in occupation of the holding or of a 'parcel,' to which the Land Purchase Acts apply."

Solicitor for the Estates Commissioners: *W. Alexander.*
Solicitor for the Treasury: *W. G. Towers.*
Solicitor for the Congested Districts Board: *J. O'Connor.*

J. E. W.

(1) 38 Ir. L. T. R. 238. (2) [1906] 1 I. R. 18.

Wylie, J.
1910.
Jan. 18.
Appeal.
Feb. 14.

In the MATTER of the ESTATE of RONALD ANNESLEY KNOX and ANOTHER, Owners and Petitioners.

Bonus—Irish Land Act, 1909, *s.* 6—*Irish Land Act*, 1903, *s.* 48—*Application for payment of increased percentage—Sale to Congested Districts Board.*

Section 6 of the Irish Land Act, 1909, does not apply to a case where, before the coming into operation of the Act, a final order was made under the old law fixing the amount of bonus, and payment was made to the vendor of that amount.

This was an application under section 48 of the Irish Land Act, 1903, and section 6 of the Irish Land Act, 1909, on behalf of the owners for an order that notwithstanding the order made "In the matter of the Irish Land Commission, and of the 48th section of the Irish Land Act, 1903; In the matter of the Estate of Ronald Annesley Knox, and Ross Mahon Knox, or one of them, owners; the said Ronald Annesley Knox, an infant, by the said Ross Mahon Knox, his next friend, and the said Ross Mahon Knox, petitioners; and of sections 7 and 77 of the Irish Land Act, 1903," dated the 19th day of July, 1909; the sum of £1018 10*s.* 6*d.*, being the difference between the amount of the percentage at the rate of £12 per cent. on the sum of £11,317, being the purchase-money of the lands sold by the Land Judge in the above matter to the Congested Districts Board, and the sum of £339 10*s.* 2*d.*, being the percentage on the said purchase-money at the rate of £3 per cent., should be paid by the Land Commission, and lodged to the credit of "the Estate of R. A. Knox and another, Owners and Petitioners."

Particulars of another portion of the lands in the said estate had been given by the Land Judge to the Estates Commissioners, but as the offer of the Estates Commissioners had been made and accepted long prior to the 24th November, 1908, the present application did not relate to any of those lands. The Congested Districts Board issued a request to the Land Judge, dated

2nd April, 1906, for particulars of the lands in reference to which the present application was made; and an order directing the furnishing of particulars was made by the Land Judge on the 11th June, 1906. The particulars were furnished to the Congested Districts Board on the 20th July, 1906. On the 13th November, 1908, the Congested Districts Board made an offer to purchase the lands for the sum of £11,317. This offer was brought before the Land Judge on the 22nd November, 1908, but, owing to the state of his Lordship's list, was not reached until the 26th November, 1908, when it was accepted. The Treasury publication fixing the rate of bonus came into force on the 24th November, 1908. On the 19th July, 1909, the Judicial Commissioner made an order declaring the vendor entitled to the percentage at the rate of 3 per cent., and directing payment of £339 10*s.* 2*d.*, being the sum calculated at that rate. This sum was paid into the Land Judge's Court. No appeal was taken against the order.

Jellett, K.C., for the owners:—

The amount of the bonus should not depend on the particular time at which the question of the bonus is brought before the Court. Section 6 is retrospective in its effect. It deals with transactions taking place before the 24th November, 1908, which could not be touched unless it were retrospective. The bulk of the section deals with past transactions. The point of the section is to save the vendor from the consequences of acts for which he is not responsible, such as delay on the part of the Congested Districts Board.

The object of the section is to get over an injustice, namely, that vendors were deprived of their bonus through the delay of other people. I am not asking the Court to reverse its order of July last, but to give me the additional rate to which the Act declares me entitled. The vendor would have received the whole of this 9 per cent. before, were it not that the state of the Land Judge's list delayed the hearing of the application.

The Solicitor-General (*C. A. O'Connor, K.C.*), and *Linehan*, for the Treasury:—

If this application were acceded to, the Court would be flooded

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with similar applications. Sub-section 1 of section 6 is plainly prospective in its effect. The proviso in sub-section 1 is also clearly prospective. It applies only to cases in which the calculation of the bonus is to be made hereafter. The section can only have a retrospective effect as regards cases that are still pending, where the calculation is to be made after the passing of the Act. If the Act were held to have a retrospective operation in favour of a vendor, it must be held to have also a retrospective operation in favour of the Treasury, who would be entitled to get back the bonus in cases where the vendor is entitled to no bonus under the present law. Had an appeal been taken in time in the present case, so that the matter would still be open, the case might come within the section.

WYLIE, J. :—

In my opinion the meaning of section 6 of the Irish Land Act, 1909, is quite plain. It seems to me to mean that in every case coming before me after the passing of the Act, where the vendor is entitled to a bonus under section 48 of the Act of 1903, I am to calculate the bonus in certain cases according to the scale in the schedule to the Act of 1909 and in certain other cases at 12 per cent. But, in my opinion, where a final order was made under the old law, fixing the amount of bonus, and payment was made to the vendor of that amount, the section does not apply. Therefore, I do not see my way to make any order for the payment of an additional percentage in the present case.

A. C.

Appeal. Feb. 14.

The owners appealed to the Court of Appeal (1).

Jellett, K.C., and *Vincent Rice*, for the appellants.

The Court without calling on *The Solicitor-General* and *Linehan*, for the Treasury, dismissed the appeal.

R. ST. J. C.

Solicitor for the owners: *C. H. Denroche.*

Solicitor for the Treasury: *W. G. Towers.*

(1) Before THE LORD CHANCELLOR, and HOLMES and CHERRY, L.JJ.

IN THE MATTER OF THE LONDONDERRY EQUITABLE CO-OPERATIVE SOCIETY, LIMITED, IN LIQUIDATION.

Ross, J.
1909.
Dec. 8, 9, 14.

Industrial and Provident Society—Extension of objects—Unregistered rules—Ultra vires—Winding up.

A society, formed for the purpose of carrying on trade as general dealers, manufacturers, and agents, was registered under the Industrial and Provident Societies Act, 1876, and its rules were duly registered. Subsequently a building department of the Society was formed, and separate rules for the building department were approved of at a special general meeting of the Society, but neither the building department nor its rules were registered under any Act. Subsequently it was decided to wind up the Society, and liquidators were appointed for the purpose of winding up its affairs:—

Held, that the building department and the Society were not separate societies; but that the building department, not being registered, had no legal existence, and could not be wound up in the present liquidation, or under the Companies Acts, and that the liquidators of the Society had no power to deal with the assets of the building department, which must be administered in a separate Chancery action.

THE Londonderry Equitable Co-operative Society, Limited, was formed in the year 1891, with the object of carrying on the trade of general dealers, manufacturers, and agents at Londonderry, including the trade of buying and selling land, and was on the 20th August, 1891, registered under the Industrial and Provident Societies Act, 1876, with limited liability.

In the year 1898 the Society, believing that they were empowered to do so by section 40 of the Industrial and Provident Societies Act, 1893, determined to form a building department of the Society, whereupon separate rules for the building department were framed and finally approved of at a special general meeting of the Society, held on the 13th April, 1899. The building department was never registered as a building society, nor were its rules ever registered with the registrar of Friendly Societies or otherwise. The rules of the building department provided that the secretary and the treasurer of the Society for

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the time being should perform the duties of secretary and treasurer respectively of the building department, and that the building department should be governed by the committee of the Society for the time being.

Rule 2 of the building department rules empowered the Society to receive deposits or loans from co-operative bodies or other sources to be applied to the purposes of the building department. It appeared from the ledgers of the building department that loans, amounting at the time of the subsequent liquidation to £2396, had been obtained under this rule, the agreements for the loans being made in the name of the Society. Large sums were advanced to members on foot of mortgages under the rules of the building department, the mortgages being taken in the name of the Society.

In the year 1907, it became necessary to wind up the Society, and on the 18th July, 1907, a resolution was passed at a special and extraordinary meeting of the Society, that it had been proved to the satisfaction of the Society that the Society could not by reason of its liabilities continue its business, and that it was advisable to wind up the same, and by the same resolution two liquidators were appointed for the purpose of winding up the affairs of the Society and distributing its property.

The liquidators now applied to the Court under section 138 of the Companies Act, 1862, for the determination of the following among other questions:—

1. Whether the building department of the Society can be validly wound up by the liquidators, together with the Society, under the winding-up resolution, dated the 18th July, 1907?

2. Whether the assets of the building department must be kept apart from, or be distributed by the liquidators together with, the general assets of the Society?

Jellett, K.C., and *Chadwick*, for the liquidators on the question as to how the building department should be wound up, cited *The London Provident Building Society* v. *Morgan* (1); *Kemp* v. *Wright* (2); *Re Phœnix Life Assurance Company* (3); Building Societies Act, 1894 (57 & 58 Vict., c. 47), sect. 10.

(1) [1893] 2 Q. B. 266. (2) [1895] 1 Ch. 121. (3) 2 J. & H. 441.

S. L. Brown, K.C., and *Osborne*, for creditors of the building department:—

Whether the building department is a part of the Society, or is a separate entity, the intention in any event was originally to form a building Society. The borrowing by the Society was *ultra vires*, and we who lent the money can follow the money, and when it has been lent out on mortgage we are entitled to step into the shoes of the mortgagees by subrogation: *Neath Building Society* v. *Luce* (1); *Blackburn Building Society* v. *Cunliffe, Brookes & Co.* (2).

T. Patton (with him *Denis Henry, K.C.*), for simple contract creditors of the original Society:—

We contend that the building department cannot be severed from the main Society. The new department was *ultra vires* from the beginning. Property obtained *ultra vires* belongs to the corporation which obtained it: *Great Eastern Railway Company* v. *Turner* (3); *Ayres* v. *The South Australian Banking Co.* (4). The whole assets of the Society, including those of the building department, are liable to pay the debts of the Society: *In re Ogilvie* (5); *Pearson* v. *Dublin and South-Eastern Railway Co.* (6).

John Leech, for creditors of the original Society, who were also members of the Society, contended that the building department and the original Society were one entity.

Babington, for a shareholder.

Ross, J.:—

Dec. 14.

This comes before me on an application on the part of the liquidators for the determination of certain questions arising in the voluntary winding up of the Society.

The Society was formed in 1891, with the object of carrying on the trade of general dealers, manufacturers, and agents at

(1) 43 Ch. D. 158.
(2) 22 Ch. D. 61; 29 Ch. D. 902; 9 A. C. 857.
(3) L. R. 8 Ch. App. 149.
(4) L. R. 3 Pr. C. C. 548.
(5) L. R. 7 Ch. App. 174.
(6) [1909] A. C. 217.

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Londonderry, and was registered under the Industrial and Provident Societies Act, 1876, on the 20th August, 1891. The rules, save as hereinafter stated, were duly registered.

The Society carried on a successful business for a number of years; but, owing to general business depression and to losses incurred, it has become necessary to wind it up. A resolution to that effect was passed on the 18th July, 1907, and the present applicants were appointed liquidators.

In the course of the voluntary liquidation, questions of the gravest difficulty have arisen, and it is impossible for the liquidators to proceed until these questions are solved. Further questions have arisen in the course of the argument before me. I shall state my views on all the questions raised; and if it is necessary to amend the summons in order to give effect to my decision on these points, I am prepared to amend the summons accordingly.

The first question arises on rules 27 and 28. In rule 27 the Committee are empowered, with the consent of a quarterly or general meeting, to borrow money. In rule 28 the amount borrowed is not to exceed the sum fixed by a quarterly or special general meeting. The first question I am asked is, whether a person has a valid claim against the Society in a case where the consent of the quarterly or special meeting has not been obtained.

The rule is express, and the authority of the meeting is essential, and without it the borrowing is unauthorized.

Does it make any difference if these borrowings appear in the ordinary accounts? I think not. To validate an irregular act two things are necessary: the members ought to have known of the irregularity, and that their action in passing the accounts would waive the irregularity.

In reply to Query No. 2, it is plain that the authority given by the resolution of the Society dated 11th November, 1904, could only apply to future loans, and could not validate a loan previously obtained in a manner contrary to the rules.

But the matter does not end there. Under rule 65, in case of contracts entered into by the Committee, the rules of the Society shall bind the Society and all other parties thereto, and the

signature of the secretary, with that of two members of the Committee, shall be conclusive evidence, in all claims made *bona fide* thereunder, that the same was entered into in conformity with the rules of the Society. The object of the rule is to enable a lender to advance money without going through all the rules and minutes in order to find out if the officials of the Society are authorized to borrow.

Now a lender is a person who enters into a contract within the meaning of this section; and if he has got the signature of the Secretary and two members of the Committee, he need not trouble himself as to whether the preliminaries have been complied with or not; he has a valid claim. It is contended that this rule is inconsistent with rules 27 and 28. I think not. Rule 65 could very well stand as a proviso immediately after rules 27 and 28, meaning that, whoever may be responsible for an unauthorized advance, the lender is not to suffer if he has obtained the signatures mentioned in rule 65. A question for the protection of such lenders ought to be framed, and it will be answered in the manner I have indicated.

The next question is, whether the building department can be validly wound up by the liquidators. A regular building society was not within the scope of the rules of the original Society. This project first appears in a resolution of the Society passed in November, 1898, that a special meeting should be called to consider a scheme for framing a building society in connexion with the original Society. The proposal was adopted, and at a special meeting of the Society a series of rules, 30 in all, for the building department were passed in April, 1899. Now, these rules were never registered under any of the Acts, and consequently have no validity whatever. It is permissible to examine the rules in order to see what was the intended relationship of the building department to the original Society.

I think it was intended to be a branch of the original Society, controlled by the Committee of the original Society; that the secretary and treasurer of the Society should be the secretary and treasurer of the department, with an addition to their salaries. The other officers were to be appointed by the members of the building department. The finance was to be separate, and the

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profits were to be distributed among the members of the building society.

Now if these rules had been properly registered—as between the members of the Society and the members who were also members of the building department, it would have been necessary to adjust accounts *inter se*. But in the case of an ordinary contract by the Society with an outside creditor, the assets of the building department could not have escaped in the absence of a special clause in the contract limiting the liability to the assets of the original Society. That is the effect of the recent decision of the House of Lords, *Pearson* v. *Dublin and South-Eastern Railway* (1), where it was held that in the absence of a special contract binding the creditor to only exact his remedy as against part of the assets of the Company, both the old and the new must be liable.

But I cannot treat the department as if its rules were registered. The department is constituted by its rules; and if the rules have no effect, the department is not constituted at all. It is a mere *nebula* that has never been able to take a concrete shape. No doubt it has borrowed money and lent money, taken mortgages, and carried on a sound business. These mortgages are taken in the name of the Society; but the Society are mere trustees for whoever may be found to be interested in the assets of the department.

Can the liquidators take over the property of this department which has no legal existence? I am of opinion that they cannot. If any money had been advanced by the original Society to the department, the liquidators could follow that money on the principle that a beneficiary or his representative can follow an unauthorized investment of his own money, and take it over, whatever it may be worth. But no such advances have been made, or if they have they were trivial, and have been paid off long ago. Therefore, the liquidators have no power to deal with the assets of the department.

There is only one matter remaining. Some amended rules were registered by the Society in 1906, and one of them contains

(1) [1909] A. C. 217.

a clause that the Society shall have power to lend to its members out of any of its available funds for the purpose of purchasing or building their own dwelling-houses. This would only affect property of the value of £50 or £60. I do not think it affects the matter at all. If it legalizes a building society, it is not this building department I am now dealing with, which was constituted on previous rules that never had binding effect.

The result of the whole matter is that I must answer that the liquidators cannot validly wind up the building department along with the Society under the resolution of 18th July, 1907; and I must decline to answer any of the other questions conversant with rules that I cannot recognize. I may add that the parties interested in the building society are not without the means of ascertaining their rights and liabilities by proceedings in the Chancery Division. The liquidator must, out of the funds of the trading Society in his hands, pay the costs of all the parties in the matter as if they were costs in an action, also the costs of sending cases to counsel.

Solicitor for the liquidators: *T. C. Wylie.*

Solicitors for creditors of the building department: *Wilson & Elliott.*

Solicitor for creditors of the original society: *Hugh C. O'Doherty.*

Solicitors for shareholders: *Bernard & Son*: *David Wilson.*

D. M. S.

Wylie, J.
1910.
Jan. 25.
Feb. 1.

IN THE MATTER OF THE EVICTED TENANTS (IRELAND) ACT, 1907, AND THE ESTATE OF THE MARQUESS CONYNGHAM.

Land Purchase Acts—Evicted Tenants (Ireland) Act, 1907 (7 *Edw.* 7, *c.* 56)—*Lands acquired under—Petition—Statutory agreement—Section* 2 (6) (14)—*Purchase-money—Mode of payment—Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *s.* 3—*Costs.*

All purchases by the Land Commission under the Evicted Tenants (Ireland) Act, 1907, are to be financed in accordance with the provisions of Part I of the Irish Land Act, 1909, *i.e.* in the case of a "pending purchase-agreement," by payment in cash or $2\frac{3}{4}$ per cent. stock, at the option of the vendor; and in the case of a "future purchase-agreement," where the Treasury have so directed, by payment in 3 per cent. stock.

Where, with a view to the compulsory acquisition of lands under the Evicted Tenants (Ireland) Act, 1907, the Estates Commissioners have gazetted the lands, and made an offer under section 2 (4) of the said Act, and where a petition by the owner has been determined by the Estates Commissioners, and there has been no appeal, on the expiration of the time limited for appeal, there is a completed statutory purchase agreement within the meaning of section 13 of the Irish Land Act, 1909, unless the power of withdrawal given to the Estates Commissioners by section 2 (14) of the said Act of 1907 is exercisable.

The said power of withdrawal is only exercisable where the offer of the Estates Commissioners has been affected by something decided on appeal, either as to the amount of the purchase-money or as to restrictions imposed on the acquisition of the lands.

QUESTIONS OF LAW submitted for the decision of the Judicial Commissioner under section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—

The Estates Commissioners proposed to acquire part of the lands of Shanvogh, containing 133A. 1R. 17P., under the provisions of the Evicted Tenants (Ireland) Act, 1907. On the 5th February, 1909, the Estates Commissioners published a notice in the *Dublin Gazette* stating that they proposed to acquire the said lands compulsorily. On the 19th April, 1909, the Estates Commissioners

offered the sum of £1500 for the purchase of the said lands pursuant to the provisions of section 2 (4) of the said Act. The owner on the 15th May, 1909, petitioned that the said lands should not be acquired without further inquiry. This petition, and all questions arising thereon, were subsequently heard and determined by the Estates Commissioners; and they refused, by order dated 20th August, 1909, to increase the said offer of the sum of £1,500 for the purchase of the said lands. The owner did not appeal from the said order. A portion of the lands included in said proceedings was afterwards acquired under the Labourers Act; and the purchase-money for the same, amounting to the sum of £33, was paid to the owner on the 5th November, 1909, and the sum offered by the Estates Commissioners had been reduced accordingly to the sum of £1467.

No order vesting the lands in the Land Commission under section 2 of the Evicted Tenants (Ireland) Act, 1907, had yet been made, nor had the purchase-money been paid into the Bank.

On the 22nd November, 1909, the evicted tenant, for whom the said land was acquired, signed an undertaking to repurchase the said lands from the Land Commission for the sum of £1467, and an application was made to the Irish Land Commission for an advance of the said sum of £1467, to be repaid by an annuity of £47 13*s.* 8*d.*, payable as is by the Irish Land Act, 1903, provided.

The said annuity of £47 13*s.* 8*d.* was calculated at the rate of £3 5*s.* per cent. per annum on the advance in accordance with the provisions of the Irish Land Act, 1903.

Possession of the said lands was taken over by the Land Commission on the 11th December, 1909, and the evicted tenant was then put into possession thereof.

The following questions were submitted:—

1. Do the negotiations between the Estates Commissioners and owner amount to an agreement which is a pending agreement within the meaning of the Irish Land Act 1909, or are the negotiations between the parties to be treated as not amounting to an agreement until an order is made by the Estates Commissioners vesting the said lands in the Land Commission?

2. Having regard to the provisions of section 66 of the Irish Land Act, 1909, defining the expression "the Land Purchase

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Acts" in that Act as including the Land Purchase Acts as defined by the Act of 1896 and the Act of 1903, the Irish Land Act, 1907, and Parts I., II., and IV. of the Act of 1909 (without making mention of the Evicted Tenants Acts, 1907 and 1908), is the method of making the advance in this case affected by the said Act of 1909, or must it be made in accordance with the provisions of section 27 of the Irish Land Act, 1903?

3. Should the purchase-money of the said lands be paid into the Bank of Ireland in cash, or in an amount of guaranteed three per cent. stock pursuant to the provisions of section 3 (3) of the Irish Land Act of 1909?

4. If an advance of the said sum of £1467 is made to the evicted tenant, must the advance be repaid by an annuity of £3 10s. per cent.?

5. Will the interest to be paid by the Land Commission to the National Debt Commissioners in respect of such advance, pursuant to the provisions of section 36 of the Act of 1903, and of section 1 (2) of the Act of 1909, be payable at the rate of 3 per cent., together with 10*s.* per cent. for sinking fund, or at the rate of 2¾ per cent., together with 10*s.* per cent. for sinking fund?

The Solicitor-General (C. A. O'Connor, K.C.), for the Treasury: The finance provisions of the Act of 1909 do not apply to compulsory purchases under the Evicted Tenants Act, except as regards bonus, which is dealt with by section 6. The provisions of section 13 have an important bearing on the case. If the owner had accepted the offer of the Estates Commissioners on or before the crucial date, there would clearly have been a statutory pending purchase agreement. The proviso to section 13 (1) does not deal with agreements as between owner and Estates Commissioners, but only as between the Estates Commissioners or Congested Districts Board and the tenants who are purchasing. The object of the proviso was to ensure that the tenants should not suffer by reason of the fact that resales to them were carried out on a postponed date. This case does not come within the proviso. If the provisions of the Act of 1909 with regard to future purchase agreements were to be applied, the owner could be compelled to take payment in three per cent.

stock. This would be inconsistent with the actual provisions of the Act dealing with the mode of payment in the case of land compulsorily acquired. It is expressly provided that there payment is to be made in cash, unless the owner otherwise agrees; *vide* sections 43 and 64. The Evicted Tenants Act is specifically brought within section 13 (*c*), but only for the purpose of resales, and then with the object of fixing the date of the statutory agreement. Further, the provisions of section 3 (4) clearly point to voluntary agreements in sales initiated by the vendor himself, and, therefore, do not apply to compulsory purchases under the Evicted Tenants Act. Advances under that Act are not advances for the purposes of the Land Purchase Acts as defined by section 66 of the Act of 1909. All through the Act, the expression "Land Purchase Acts" is used in contradistinction to "Evicted Tenants Act," and the Evicted Tenants Act is not a Land Purchase Act.

Garrett Walker, K.C., for the owner:—

There was a completed agreement prior to the crucial date. The petition was determined by the Estates Commissioners on the 20th August, 1909. They refused to increase their offer. Their original offer remained unaffected, and was binding on the owner as soon as the time for appeal expired, *i.e.*, on the 3rd September, 1909. No doubt the time had not expired within which the Estates Commissioners could have withdrawn their offer before the crucial date. But having subsequently entered on our lands, they waived their rights in the matter, and the date of the agreement must relate back to the date of the final order. The Estates Commissioners are estopped by their acts from denying that there was a completed agreement. Further, I support the view submitted by the Solicitor-General, that the provisions of section 3 of the Act of 1909 are inapplicable to purchases under the Evicted Tenants Act. Accordingly, the purchase-money must be paid in cash.

WYLIE, J:—

Feb. 1.

On the 5th February, 1909, the Estates Commissioners published the usual notice in the *Dublin Gazette*, of their intention to acquire certain lands under the Evicted Tenants Act, and on the 19th

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April, 1909, offered the owner £1500 as the purchase price of said lands. On the 15th May, 1909, the owner, being dissatisfied with the price offered, lodged a petition, which was heard and determined by the Estates Commissioners on the 20th August, 1909, refusing to increase the offer. From that determination the owner did not appeal, the time for appeal expiring on the 3rd September. On the 22nd November, 1909, the evicted tenant signed an undertaking to purchase the lands from the Land Commission on the terms of repaying the advance by an annuity at 3¼ per cent. On the 11th December, 1909, possession was taken by the Land Commission, and the evicted tenant put into possession on the same day. The purchase-money has not yet been lodged in Bank, nor has any order been made vesting the lands in the Land Commission. In this state of facts a number of questions have been submitted to me, with reference to the mode in which purchase agreements under the Evicted Tenants Acts are now to be financed, and, in particular, the mode of financing this particular case. One of the questions raised is of general application, and it will be more convenient to dispose of it first.

It was contended by the Solicitor-General on behalf of the Treasury, that the finance provisions of the Act of 1909, save so far as the bonus is concerned, do not apply to compulsory purchases under the Evicted Tenants Act, whether under pending or future purchase agreements. In other words, that in case of all such purchases the Estates Commissioners are still bound to lodge the purchase-money in cash in the Bank, under the Evicted Tenants Act, and the evicted tenants are to pay an annuity of only 3¼ per cent., notwithstanding the provisions of the Act of 1909. The chief reason for this contention was that, as all compulsory purchases under the Act of 1909 are to be paid for in cash, unless the owner otherwise agrees, it would be absurd to impute to the Legislature an intention to enact that payment in cash, in case of future compulsory purchases under the Evicted Tenants Act, should be discontinued, and payment made in stock, if the Treasury should so direct. Well, I can form no opinion as to what the Legislature might regard as an absurdity in legislation; all I have to do is to ascertain, as best I can, the intention of the Legislature as expressed in the provisions of the recent Act.

Now, prior, to the Act, there was no difference whatever in the mode of financing sales under the Evicted Tenants Act, and other sales under the Land Purchase Acts. Just as section 2 of the Evicted Tenants Act required the Estates Commissioners to pay the purchase-money in cash into Bank in case of compulsory purchases under that Act, so section 24 (1) of the Act of 1903 required them to pay the purchase-money in cash into Bank in cases of direct sales; and, in all cases of advances, the tenant purchaser's annuity was at $3\frac{1}{4}$ per cent., and the rate of interest paid by the Land Commission to the National Debt Commissioners was $2\frac{3}{4}$ per cent. The Act of 1909, section 1, now provides that, in cases of advances made in pursuance of "future purchase agreements" the annuity shall be at $3\frac{1}{2}$, and the interest paid by the Land Commission to the National Debt Commissioners 3 per cent. Then, after giving the Treasury power to create 3 per cent. stock, section 3 provides that, notwithstanding anything in section 27 of the Act of 1903, advances for the purposes of the Land Purchase Acts may be made in whole or in part by means of stock; and sub-sect. 3 provides that, for the purpose of carrying into effect future purchase agreements, advances, may, if the Treasury think fit so to direct, be made in 3 per cent. stock; and by sub-sect. 4 the vendor is bound to accept the stock as the equivalent of the corresponding amount of purchase-money.

The Treasury have now given a direction that, in case of all "future purchase agreements," the advances shall be in stock. If, therefore, a compulsory purchase under the Evicted Tenants Act is a "future purchase agreement" within section 1 and sect. 3 (3) of the Act of 1909, the purchase-money must be advanced in stock, the tenant's purchase annuity on resale must be at $3\frac{1}{2}$ per cent., and the Land Commission must pay 3 per cent. interest to the National Debt Commissioners.

The Solicitor-General endeavoured to exclude compulsory purchases under the Evicted Tenants Act from section 3 on two grounds. First, he contended that advances under the Evicted Tenants Act were not advances for the purposes of the Land Purchase Acts within the meaning of section 3, *i.e.*, as defined by section 66 of the Act of 1909. That definition, by reference to the definition in section 98 of the Act of 1903, includes Part I of

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the Act of 1903, and section 20 of the Evicted Tenants Act enacts that the Evicted Tenants Act is to be construed as *one* with Part I of the Act of 1903, and to be cited with the Land Purchase Acts; and section 15 of the same Act enacts that the Land Purchase Acts shall apply to purchases under that Act as if the lands were purchased by agreement. In fact, all purchases under the Evicted Tenants Act were financed as to purchase-money, bonus, tenant's annuity, and interest, under Part I of the Act of 1903. In my opinion, therefore, the Solicitor-General's first contention is unsustainable.

Secondly, the Solicitor-General contended that section 3 (3) only extends to voluntary agreements, Now, there is certainly nothing in the sub-section to limit it to voluntary agreements, and it seems to me quite clear that it extends to all "future purchase agreements" as defined in section 13 (*b*), and, therefore, includes all agreements entered into by the Land Commission after the 15th September, 1909.

Then sub-section (*c*) of section 13 provides that an order of the Estates Commissioners under section 2 of the Evicted Tenants Act vesting land in the Land Commission shall, for the purposes of this part of this Act, *i.e.*, land purchase finance, be treated as an agreement entered into by the Land Commission. Now, in every case in which land is acquired compulsorily under the Evicted Tenants Act, the Estates Commissioners are required by that Act to make an order vesting the land in the Land Commission. Therefore, in every case in which land is acquired by the Estates Commissioners under the Evicted Tenants Act, it must be deemed to be acquired by agreement for the purposes of Part I of the Act of 1909, *i.e.*, for the purposes of the financial provisions of that Act. If it was not intended to apply the financial clauses of Part I of the Act of 1909 to purchases under the Evicted Tenants Act, there was no need for that part of sub-section (*c*) of section 13 which I have cited, because section 15 of the Evicted Tenants Act had already provided that the Land Purchase Acts should apply in the case of land acquired under that Act as if the land were purchased by agreement, with the necessary modifications, and, in particular, the date of the payment of the purchase-money into Bank was to be substituted for the

date of the purchase agreement; but if the payment of the purchase-money into Bank in cases under the Evicted Tenants Act was intended to be discontinued, it became necessary to provide some other mode of fixing the date of the statutory agreement, for the purpose of the application of the Land Purchase Acts, and this is done by sub-section (*c*).

It is also to be noticed that sub-section (*c*) of section 13 places purchases by the Congested Districts Board from the Land Judge in the same position as purchases under the Evicted Tenants Act with respect to the financial provisions of the Act of 1909.

Besides, it could hardly be contended that the words "future purchase agreements" have not the same meaning in section 3 (3) that they have in section 1; and it seems to me to be beyond all doubt that statutory agreements under sect. 43 (3) and sect. 64 of the Act of 1909 are to be financed under section 1, and other sections of the Act, in the same manner as other "future purchase agreements," save that, as expressly provided by those sections, the purchase-money is to be paid in cash. If the Legislature had intended that purchases under the Evicted Tenants Act should in future be financed in the same way as compulsory purchases under the Act of 1909, proper words for that purpose could have been as easily inserted in section 13 (*c*) as in sections 43 and 64.

For these reasons, it seems to me to be clear that all purchases by the Land Commission under the Evicted Tenants Act are to be financed in accordance with the provisions of Part I of the Act of 1909—that is, in the case of a "pending purchase agreement" by payment in cash or 2¾ per cent. stock at the option of the vendor, and in the case of a "future purchase agreement" by payment in 3 per cent. stock.

This brings me to the consideration of the first question submitted to me, with regard to this particular case, viz.—Do the negotiations between the Estates Commissioners and the owner amount to an agreement which is a "pending purchase agreement" within the meaning of the Irish Land Act, 1909, or are the negotiations between the parties to be treated as not amounting to an agreement until an order is made by the Estates Commissioners vesting the land in the Land Commission? This question is evidently based upon the latter part of sub-section (*c*)

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of section 13, already cited, and appears to assume that, at the date of the passing of the Act of 1909, negotiations were still pending in this case between the Estates Commissioners and the owner. Whether this was so must be determined by the provisions of the Evicted Tenants Act.

Now, section 2 of that Act provides that, where it was proposed that any land should be acquired compulsorily under the Act, the Estates Commissioners should publish a notice to that effect in the *Dublin Gazette*, requiring any persons interested, who might object, to lodge with the Land Commission a statement of their grounds of objection, and, if it appeared to the Estates Commissioners, after considering the inspector's report and any objection lodged, that no valid objection had been raised to its acquisition, they might, if they thought fit, make an offer to the person appearing to them to be the owner of the land for the purchase thereof at such price as appeared to them to be a reasonable price. Upon the making of such offer, the Estates Commissioners were to give all persons interested notice of their intention to acquire the land at such price, unless a petition was presented. If no petition was presented, or if any such petition was withdrawn, the Estates Commissioners were, by section 2 (6), bound to pay the purchase-money into Bank within a limited time, and to make an order vesting the land in the Land Commission.

From the above provisions it is clear that, where the Estates Commissioners had gazetted the lands and made an offer, if the owner did not petition against the price, or withdrew any petition he might have presented, the purchase agreement was then closed. The Estates Commissioners could not withdraw, but were bound to pay the money into Bank and vest. It seems to me, therefore, in such a case, that if no petition was presented within the prescribed time, or if presented, was withdrawn, thereupon there was, in substance and in fact, a statutory purchase agreement between the vendor and the Estates Commissioners binding on both parties.

In this case, however, a petition was presented, and the matter thereof was determined by the Estates Commissioners on the 20th August, 1909, by refusing to increase their offer. Their original offer, however, remained unaffected, and might then have been

accepted by the vendor, or he might, within fourteen days, have appealed, either on the question of price, or on any other ground of objection raised. The vendor did not appeal on any ground, and the time for appeal expired on the 3rd September, 1909.

On the same principle as that which I have applied to the case where there was no petition, it would seem to me that when the time for appeal expired in this case, without any appeal, the vendor must be taken to have accepted the offer, and the purchase agreement was thereupon complete, unless the power to withdraw, given to the Commissioners by section 2 (14), prevents such an agreement from being inferred. Now, comparing sub-section 14 with sub-section 6, it seems to me that this power of withdrawal was only intended to be given to the Commissioners where their offer was affected by something decided upon an appeal either as to the amount of the purchase-money or as to restrictions imposed on the acquisition of the lands. There is no question but that the amount of the purchase-money in this case was based upon a cash payment, and it would be a gross injustice to compel the owner now to take stock which may be of much less value, because the Estates Commissioners have delayed making the payment and vesting order.

It seems to me, therefore, that I am in no way straining the Evicted Tenants Act, and I am certainly doing justice as between the Estates Commissioners and the vendor, in holding that the statutory purchase agreement in this case was complete prior to the 15th September, 1909, and was a "pending purchase agreement" within the 13th section of the Act of 1909, sub-section (*a*), and is not, in my opinion, in any way affected by sub-section (*c*) of that section.

This, I think, enables me to answer all the questions put to me. I answer the first part of question 1—"Yes"; the second part—"No." I do not answer second question further than I have in my judgment. To the third I answer—"In cash." To the fourth—"No; by annuity of 3¼ per cent." To the fifth—"2¾ per cent."

With reference to cases generally I just wish to say this, that if the view put forward on behalf of the Treasury is right, viz., that the intention of the Legislature, notwithstanding the Act of

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1909, that the purchase-money of lands acquired compulsorily under the Evicted Tenants Act should continue to be paid in cash, the Treasury have in their hands a simple method of carrying that intention out in strict accordance with the Act, *i.e.*, by excluding such cases from their direction to pay in stock. And with reference to this particular case, and any other similar cases, if I were compelled by the facts to hold that the agreement for purchase was not complete prior to the 15th September, 1909, and that, as between the Estates Commissioners and the owner, matters were still in the negotiation stage, it seems to me that justice might still be done, either by the Estates Commissioners reconsidering the question of price, having regard to the fact that the purchase-money must be taken in stock, or by my extending the time for appeal on the question of price.

With regard to the question of costs I will deal with them as if they were costs arising on an appeal as to value, and I will declare the owner entitled to his costs as against the Land Commission.

Solicitor for the Treasury: *W. G. Towers.*

Solicitors for the Marquess Conyngham: *McMahon & Tweedy.*

J. E. W.

Appeal. 1908. Nov. 11, 16.

HURLEY *v.* HURLEY (1).

Merger—Wife's chattels real—Marriage prior to 1883*—Purchase by husband of reversion in fee.*

The mere purchase by a husband of the reversion in fee of chattels real, the property of his wife, their marriage having taken place before 1883, does not *per se* cause a merger.

Decision of Barton, J., affirmed.

Appeal by the defendant, heir-at-law of Daniel Hurley, deceased, from the decision of Barton, J., [1908] 1 I. R. 393, where the facts are stated.

(2) Before The Lord Chancellor, and Lords Justices FitzGibbon and Holmes.

Ignatius J. O'Brien, K.C., and *A. M. Sullivan*, for the appellant.

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Ronan, K.C., *Conner, K.C.*, and *Norwood*, for the respondent, Anne Hurley.

The arguments of counsel were in substance the same as those reported in the Court of Barton, J.

THE LORD CHANCELLOR:—

Nov. 16.

In this case we have had a learned discussion upon a conflict of title between the heir-at-law of a deceased husband and the widow of that husband, to two terms of years which had belonged to the wife when she married, the reversion on which was bought by the husband in the Landed Estates Court on 25th February, 1898.

The widow survived, and claims the terms of years as hers by survivorship. The heir-at-law, on the other hand, says that the husband, by his own act, purchased, and thereby merged the terms; though it would have been otherwise if he had acquired the reversion by act of law only.

It is somewhat refreshing to find that the venerable authorities and *dicta* which have been cited from the blackletter reports are irreconcilably in conflict, and as regards text-writers we have on the one side the high authority of Preston, Conv., vol. 3, pp. 273–303, which we find copied into some respected text-writers, and on the other the equally valuable opinion of Lord St. Leonards in his work on Vendors and Purchasers p. 619, for what he vouches as the opinion, though not the decision, of the Court of Exchequer in *Jones* v. *Davies* (1), affirmed in the Exchequer Chamber (2). It is not easy to appreciate the distinction in principle between the act of the party and the act of law, such as marriage or descent, where the husband accepts the *status* and benefits. There was only one case cited as a direct authority on the very question before the Court: *Carter* v. *Lowe* (3), which appears to me a somewhat complicated case.

(1) 5 H. & N. 766. (2) 7 H. & N. 505. (3) Owen, 56.

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The Lord Chancellor.

We are I think driven, as Mr. Justice Barton considered he was, to decide the question on principle. The law as to the right of a husband to his wife's chattels real is settled from the earliest times. He can alienate or dispose of them during his life by an act *inter vivos*; and if he survives his wife, they become his absolutely. On the other hand, if the wife survives, without the husband having alienated or disposed of them, she takes them absolutely as survivor. This disposition by him would equally take place if he took a new lease, because this involves a surrender of the old, and this is equal to an assignment. This revival of property in the wife on his death, when she survives, is only defeasible by his disposition of the term during his life.

In the view I take of this case, there has not arisen that incompatibility of the subsistence of two estates, which might have arisen if the husband had conveyed to him, in possession, the fee-simple of the lands as comprised in the leases. This would raise acutely the question discussed by Mr. Preston, and would only leave for discussion the question, whether his having the term in *autre droit* would make a difference. I am disposed to think that, applying the equitable rules to the doctrine of merger, which even in a Court of law now we are bound to apply, the estates would not coalesce to the prejudice of the wife, not being vested in the husband in the same right, unless it could be held that the conveyance to him involved a disposition or surrender of the wife's term. This inference would not be necessary; for his deed, and the transaction of itself, would not show an intention to defeat the wife's right. It would be like the case where a husband has mortgaged his wife's chattels real, which has been held not to defeat the right of the wife to redeem: *Clarke* v. *Burgh* (1). But further in the present case the merger is founded on the deed of 1898, which conveys to him the reversion subject to the chattel terms. Unless the wife's term is dealt with, the former rights, including hers by survivorship, continue; and how can we infer an intention to dispose of, or deal with the terms, of which

(1) 2 Coll. Ch. Cas. 221.

he was possessed in right of his wife, when the deed purports to preserve them? He could after the deed of 1898, as before, assign or dispose of the terms; but, as he died without doing so, I think the wife's right remains.

I am quite satisfied with the judgment of Mr. Justice Barton, and the reasons on which he has founded it.

FITZ GIBBON, L.J., concurred.

HOLMES, L.J.:—

A lady entitled to the lessee's interest in certain premises under two leases for the respective terms of 300 years married in 1873 without any settlement; and her husband during the coverture purchased, in the Land Judge's Court, the fee-simple estate in the premises, which were conveyed to him by the Land Judge, subject to the two leases.

The wife, who survived her husband, claims in this action the interest under the leases; and her right depends upon whether the purchase by her husband of the reversion in fee did, or did not, operate as a merger of the terms of years. There is no evidence of intention, or of any matter from which intention might be inferred; and if there was merger, it can only have arisen, as the case is presented to us, from the conveyance by the Land Judge. Although the question under consideration has been discussed by Judges and writers on the law of real property for two or three centuries, no conclusion has been hitherto arrived at; and the views of great lawyers are so conflicting as to justify the author of Platt on Leases in not attempting to reconcile them, being as he said convinced that nothing short of a modern judicial decision can reduce this confusion to order.

Mr. Sullivan, in his argument, relied on cases in which it was held that where an executor, possessed of a term of years, purchased the reversion in fee, there was a merger of the leasehold interest, and he contended that this is a much stronger decision than what is asked for by the appellant. It would certainly be so if the executor had no beneficial interest in the term. But I think it clear that in these cases there had been no bequest of the term, and that, therefore, by the old law, it was the property of the executor. This is shown by the fact that, even in such a case,

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the Courts of Equity would not allow merger to prejudice the testator's creditors

I asked Mr. Sullivan to refer us to any actual decision of the matter now in controversy, and the only one he could mention was *Carter* v. *Lowe* (1), but I find that the facts therein were materially different. The wife had a term of years, and the husband after marriage obtained another lease. He had the same right to surrender the premises demised to his wife as to assign them; and the acceptance of a new lease implied such a surrender. Therefore, it was a case where the husband, being himself a lessee, acquired the fee. In these circumstances, I am not disposed to weigh the opinions of Dyer and Manwood as against Hobart and Holt. I know that Mr. Preston, who seems to have been an enthusiastic champion of merger, preferred the former; and that Lord St. Leonards, in his last edition of the Law of Vendors and Purchasers, appears to lean towards the latter.

I shall try to find some legal principle to guide me. I start with the proposition that, if the owner of a term of years purchases the reversion in fee, and there is no evidence of intention, merger follows. Why? Because the two estates are vested in the same person, at the same time, and in the same right; and, therefore, there is no reason against their coalescing. But had the husband in the present case the two estates in the same right? I think not. He had certain rights in his wife's leasehold, but so had she. His right was to assign or surrender it; but if he did not do so, it was the property of his wife on his death if he predeceased her, not through him but by reason of her original title thereto. I agree with Barton, J., that both husband and wife are possessed in her right; and, according to *Bracebridge* v. *Cook* (2), if a stranger gets possession, both ought to join in an ejectment, and the wife shall have judgment as well as the husband.

It is now settled, contrary to the opinion of Mr. Preston, that if the husband took the fee by devise there would be no merger. It is also admitted that if, having the reversion, he

(1) Owen, 56; Mo. 358. (2) Plowd., 417.

married the leaseholder, merger would not be the result. It is said that in these cases there was no act on the part of the husband. I would have thought that marriage was as much "an act" as buying a reversion. Speaking for myself, I regard this doctrine of act of the party as distinguished from act of law, propounded by Mr. Preston, as an ingenious fallacy. The only act of the husband was to purchase the reversion; and I am unable to see how this can affect the respective rights of his wife and himself in the lease.

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Solicitor for the plaintiff: *J. T. Wolfe.*
Solicitor for the defendant: *P. Ryan.*

R. ST. J. C.

IN THE MATTER OF AN INDENTURE OF MORTGAGE, DATED THE 28TH FEBRUARY, 1908. THE CENTURY INSURANCE CO., LTD., *v.* LAURENCE LARKIN.

M. R. 1910. Feb. 1.

Practice—Motion for attachment—Indorsement on order—Order XLI, R. 4.

The Court will not attach a person for disobedience to an order of the Court requiring the person to do a given act within a given time, unless a copy of the order, with a proper indorsement, is served upon him in due time, in accordance with the provisions of Order XLI, R. 4.

The fact that the person sought to be attached for disobedien e was present in Court when the order was made, is not sufficient to dispense with such service of the order.

A person who was ordered by the Court to deliver up clear and absolute possession of certain premises on or before the 15th January, 1910, refused to deliver up possession of the premises on the 17th January, 1910. He had been present in Court when the order was made, and this fact was recited in the order, but no copy of the order was served upon him till the 18th January, 1910. The Court refused to make an order attaching him for contempt.

Hearne v. *Tennant* (14 Ves. 136) distinguished.

MOTION to attach the defendant for contempt of Court.

By an order of the Master of the Rolls, dated the 20th December, 1909, it was ordered that the defendant, Laurence

M. R. 1910.

CENTURY INSURANCE CO. v. LARKIN.

Larkin, against whom the present application was made, "do, on or before the 15th day of January, 1910, deliver up to the plaintiffs, or to a person duly authorized by them in that behalf, clear and absolute possession of the house and premises No. 37 Monkstown Road, Monkstown." The defendant was present in Court when this order was made, and the fact of his so being present was recited in the order. He was on that occasion warned by his Lordship not to disobey the order. On the 12th January, 1910, the plaintiffs' solicitors wrote to the defendant, asking if 12 noon on Saturday, the 15th January, would suit him to give up possession of the premises. The defendant made no reply to this letter. The plaintiffs took no further step till Monday, the 17th January, when a representative of the plaintiffs' solicitors attended at 37 Monkstown Road, to take up possession of the premises, which the defendant refused to give. No copy of the order of the 20th December, 1909, ordering the defendant to give up possession, was served upon the defendant till the 18th January, 1910, when a copy, with the indorsement required by Order XLI, R. 4, was served upon him. The plaintiffs now moved to attach the defendant for his contempt in not obeying the order of the 20th December, 1909.

The defendant did not appear.

H. Geoghegan, for the plaintiffs :—

Where the defendant is personally present in Court when the order is made—as the order itself recites in the present case—no service on the defendant of any order, indorsed or unindorsed, is necessary. Service in such a case is supererogatory and unnecessary where, as here, the defendant persists in his disobedience, and still withholds possession of the premises. I rely upon *Hearn* v. *Tennant* (1), *Avory* v. *Andrews* (2), *Kimpton* v. *Eve* (3), and *Petty* v. *Daniel* (4).

(1) 14 Ves. 136 (also reported under the name of *Osborne* v. *Tennant*, in 14 Ves., 1st ed., at p. 136).
(2) 30 W. R. 564.
(3) 2 Ves. & B. 349.
(4) 34 Ch. D. 172.

THE MASTER OF THE ROLLS:—

The order made by me on the 20th December, 1909, was a plain order, free from all complication—"It is ordered that the defendant deliver up clear and absolute possession of the house and premises in Monkstown Road, Monkstown, on or before the 15th January, 1910." The order was made on the application of the plaintiffs, and made in the presence of the defendant, Laurence Larkin; and the defendant was warned by me that I was giving him an extension of time on account of the Christmas season, and the difficulty at that time of obtaining a house into which he could move. I gave Mr. Larkin so long a time to comply with the order on account of the piteous appeal he made to me, and indeed I do not think that either the plaintiffs or the purchasers were dissatisfied with my leniency. Now, it is a rule of Court that such an order shall be served on the party ordered to do the act (1). "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.: 'If you, the within-named A B, neglect to obey this judgment [or order] by the time herein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [or order].'" The order in this case is to deliver up, on or before the 15th January, 1910, these premises. I am bound to say that in my experience at the Bar and on the Bench, which now, unfortunately, extends over thirty years, I have known a number of cases in which attachment has been refused because of the neglect of that order for service, or a similar order; and every solicitor, nay, every apprentice, knows that the first duty of the solicitor obtaining an order requiring a person to do a given act within a given time is to serve the order, with a proper indorsement thereon, on the person who is required to do the act. How or why that precaution was omitted in the present case is not quite clear. There

(1) Ord. XLI, R. 4.

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would, however, appear to have been negotiations going on between the parties. For, indeed, when it was found that the defendant did not mean to obey the order, and give up possession, a belated notice, containing a copy of the order, with a regular, proper indorsement, was served upon him. I will not send to prison, even though he was in Court and knew the purport of the order, a man who has not been dealt with according to the rules and orders of the Court. Mr. Geoghegan referred me to a case, *Hearn* v. *Tennant* (1), a decision of Lord Eldon; but the case was not like the present. There was no rule of Court dealing with it. It was a case of an injunction to restrain execution under a judgment. I have looked into the other cases cited, and it seems clear that the authorities in which the presence in Court of the party sought to be attached has been held to dispense with notice of the order have been cases of injunctions to restrain a man from doing something, he having been present in Court, and told by the Court not to do the act. For some reason or another the rule-making authority in this country, and in England also, considered that the order of a Court compelling a man to do a certain act stood in a different position from other orders. The rule in Ireland requires the time, or time after service of the order, within which the act is to be done to be stated, and requires a memorandum to be indorsed warning the person of the consequences of not doing the act. I consider that the old decisions have no real application to those cases which come within the Order and Rule I have cited. If you want to send a man to gaol for contempt of Court for not doing a certain act, you must serve the order which compels him to do the act upon him, and it must contain a proper indorsement upon it. I need hardly say that I shall not allow this defendant to defy the Court much longer. I shall make an order upon him to deliver up possession of the premises clear and absolute within forty-eight hours of the service of the order. So surely as he disobeys, so surely shall he go to gaol. I give liberty, in case of non-compliance, to issue an application for attachment within two days after the expiration of the forty-eight hours.

Solicitors for the plaintiffs: *A. & L. Goodbody.*

A. C.

(1) 14 Ves. 36.

IN THE MATTER OF THE ESTATE OF EDWARD SEYMOUR EVANS.

Wylie, J.
1910.
Feb. 1, 7.

Married woman—Marriage after passing of Married Women's Property Act, 1882—Death, without disposing of separate personal estate—Devolution—Title of husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1)—Costs of administration.

The Married Women's Property Act, 1882, has not altered the devolution of the undisposed of separate personal estate of a married woman, and accordingly, on the death of a married woman, even if married after the passing of the Act, the husband is entitled, *jure mariti*, to the undisposed of chattels real to which the deceased was entitled for her separate use, and administration is unnecessary to perfect his title.

A woman married since the passing of the Married Women's Property Act, 1882, died in 1895, without having disposed of, by will or otherwise, an undivided share in an annuity, charged on lands during the residue of a term of years, to which said undivided share she was absolutely entitled in remainder, subject to a life estate therein. On the determination of the life estate in 1907, her husband entered into receipt of said undivided share in said annuity. The lands out of which the said annuity was payable having been sold under the Land Purchase Acts, the husband, without being required to do so, took out administration to his deceased wife, and paid the necessary Crown duties, in order to make title to his share of the redemption price of said annuity:—

Held, that the costs of taking out administration should not be allowed as against the purchase-money of the lands sold, on the grounds (1) that the administration was unnecessary to perfect the husband's title, and (2) that even if administration were necessary, it should have been taken out before entering into receipt of the share of the annuity.

In re Lambert's Estate; Stanton v. *Lambert* (39 Ch. D. 626), and *Surman* v. *Wharton* ([1891] 1 Q. B. 491) followed.

QUESTION arising on allocation. By marriage settlement, dated the 15th December, 1795, the lands sold in this matter were limited (*inter alia*) to the use of trustees for a term of a thousand years, upon trust that the husband should receive an annuity or yearly rent-charge of £300 (Irish) during his life, and after certain other limitations, that from and after the death of the

Wylie, J. 1910.

In re Evans's Estate.

survivor of the husband and wife, if there should be issue of the marriage then living, the said annuity should go to such issue for the residue of said term, in such manner as therein provided. The said annuity subsequently became subdivided. One undivided third share thereof became vested in Charles Mason. The said Charles Mason died on the 28th April, 1895, having by his will bequeathed his undivided share of said annuity to his wife, Mary Bruce Mason, for her life, and, on her death, to his three daughters Mary Massy Stanley, Catherine A. Jervis, and Anne P. Mason, share and share alike. The said Mary Massy Stanley had been married on the 23rd April, 1883, to Charles H. Stanley, and died on the 23rd May, 1895. The said Mary Bruce Mason died on the 1st November, 1907, whereupon the said Charles H. Stanley, in right of his deceased wife, Catherine A. Jervis, and Anne P. Mason, became entitled as tenants in common to the said one undivided third share of said annuity, and respectively entered into receipt thereof.

The entire of said annuity had been redeemed in the Land Purchase proceedings for the sum of £7,450, and on allocation, the said sum had been placed to a separate credit. The following requisition on title had been made by the Examiner—Does Charles H. Stanley claim to be entitled to his deceased wife's share *jure mariti* without administration, or has he obtained a grant? A grant of administration to the estate of his deceased wife was subsequently obtained, and the necessary Crown duties paid by Charles H. Stanley. It appeared that deceased had no assets other than her share of said annuity. The solicitor having carriage objected to any costs in respect of said grant of administration being allowed as against the purchase-money of lands sold. The Taxing-Master disallowed the costs objected to, but stated that he would have allowed them, if the Examiner had certified that administration was necessary. The Examiner left the question for the decision of the Court, as to whether administration was necessary?

F. W. Price, for the vendor:—

All the property of a woman married after the passing of the Married Women's Property Act, 1882, was by that Act put in the

same position as the separate property of a woman married before the Act. *In re Lambert's Estate, Stanton* v. *Lambert* (1), and *Surman* v. *Wharton* (2) show that the *jus mariti* attaches to the separate undisposed of personalty which accrued to a woman married before, but dying after the Act. The Act does not alter the devolution of such property: see note (*e*) to section 1 (1) of the Act, in Carson's Real Property Statutes (1902 ed.), at p. 343. Further, assuming that it was necessary to take out administration, this step should have been taken, in any event, in order to entitle the husband to receive the annuity, and he might have been required to take it out at any time by the owner of the lands whether the sale under the Land Purchase Acts had taken place or not: *In re Bear Island Defence Works and Doyle* (3) was a case where lands were being acquired under compulsory powers, and persons equitably entitled in possession were compelled to take out administration in order to perfect their title. Here we are dealing with a rent payable out of lands; and if administration was necessary, the owner of the rent was not entitled to receive the rent until he had taken out administration. In *In re Elementary Education Acts*, 1870 *and* 1873 (4), Farwell, L.J., says: "Probate was bound to be obtained whether compulsory powers were exercised or not." See also *In re Thames Tunnel* (*Rotherhithe and Ratcliff*) *Act*, 1900 (5).

J. H. Russell, for Charles H. Stanley:—

Section 1 (1) of the Married Women's Property Act, 1882, did not affect the devolution of the separate property of the wife, but only the *jus mariti*. The effect of the statute was to give the wife the legal estate in her property. If the wife, having such legal estate, died without having disposed of her separate property, her husband would have no right to it *jure mariti*, because it was never his, and in order to make title, it would be necessary for him to take out administration: see note to section 1 (1) of the Act in Williams' Law of Executors and Administrators (1905 ed.), at p. 521. *In re Lambert's Estate, Stanton* v. *Lambert* (1), and *Surman* v.

(1) 39 Ch. D. 626.
(2) [1891] 1 Q. B. 491.
(3) [1903] 1 I. R. 164.
(4) [1909] 1 Ch. D. at p. 59.
(5) [1905] 1 Ch. D. 493.

Wylie, J. 1910. *In re* Evans's Estate. Feb. 7.

Wharton (1), were cases of women married before, and whose title had accrued before the passing of the Act. Here it is the case of a woman married after the passing of the Act.

Wylie, J.:—

The lands sold in this matter were subject to the payment of an annuity or yearly rentcharge of £300 (Irish) for a long term of years. This annuity has been redeemed, and Charles H. Stanley claims a portion of the redemption-price as property to which his wife was entitled for her separate use by virtue of the Married Women's Property Act, 1882. His wife died in 1895, and on the death of her mother, who was entitled to a life estate therein, in 1907, Charles H. Stanley entered into receipt of her share of the annuity, and it was paid to him up to the time of sale by the vendor, who paid it without requiring him to take out letters of administration to his deceased wife. In order to prove his title to his share of the redemption-price, Charles H. Stanley has now taken out administration to his deceased wife, and has paid the Crown duties, without being called upon to do so, either by the vendor or the examiner; and, under these circumstances, he claims to be paid out of the vendor's purchase-money the costs of taking out such administration, including the amount of the Crown duties, as part of his costs of proving his title to his share of the redemption-price.

Two objections have been made by Mr. Price as counsel for vendor—first, that the claimant had a good title to his wife's interest in the rent redeemed, which was a chattel real estate, without taking out administration; and secondly, that if such administration was necessary to perfect his title, it was his duty to have taken out such administration, and paid the Crown duties, before entering into receipt of the rent.

The first objection raises a question of law which has been much discussed in the text-books to which I have been referred, and diverse opinions have been expressed upon it. But the question appears to me to have been practically decided in two cases mentioned by counsel. Prior to the Married Women's Property

(1) [1891] 1 Q. B. 491.

Act, 1882, the rights of the husband in his wife's leaseholds were undoubtedly well settled. In *In re Bellamy* (1), Kay, J., reviewed all the authorities, and laid it down as clear law that the husband during coverture, could absolutely dispose of his wife's leaseholds, and that, upon her death, if undisposed of, they vested in him *jure mariti*. In that case he held that even when, at the wife's death, her leasehold interest was reversionary, it vested in the husband *jure mariti*, and he disallowed the costs of administration taken out by the husband to complete his title, without being required or called upon to do so.

Now, that being the state of the law prior to the Married Women's Property Act, 1882, the question raised has been the subject of decision since the Act in *In re Lambert's Estate, Stanton* v. *Lambert* (2), and *Surman* v. *Wharton* (3). In the former case Stirling, J., held that the Married Women's Property Act had made no change in the devolution of the undisposed of separate estate of a married woman after her death; and, in the latter case, the Queen's Bench Division decided that, since the Act on the wife's death, her undisposed of leaseholds settled for her separate use passed to her husband *jure mariti*, that administration was unnecessary, and that the husband so taking the leaseholds was the legal personal representative of the wife within the meaning of section 23 of the Act. Following these decisions, I must hold that the costs claimed here were not costs necessarily incurred, and I must disallow them as against the vendor.

As to the second ground of objection, it seems to me that, if administration were necessary to complete the husband's title to the rent, it should have been taken out before entering into receipt of the rent; and the vendor could, at any time, have refused to pay the rent until administration was taken out; and I cannot hold that his forbearing to do so can make him now liable to pay the costs and Crown duties paid in respect of such administration.

Solicitor for the vendor: *H. D. Vaughan.*

Solicitor for Charles H. Stanley: *W. J. Verlin.*

J. E. W.

(1) 25 Ch. D. 620. (2) 39 Ch. D. 626. (3) [1891] 1 Q. B. 491.

Appeal.
1909.
Oct. 29.

IN THE MATTER OF THE ESTATE OF WILLIAM H. H. BARTON.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48, *sub-s.* 4 —*Estate "so circumstanced that it would . . . be sold without the consent of the owner as to price"—Date of ascertainment.*

The date of sale is the date to be applied in considering whether an estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, within the meaning of section 48, sub-section 4, of the Land Act, 1903.

An absolute order for the sale of an estate by the Land Judge was in force at the date of the passing of the Land Act, 1903, the estate being then insolvent. The petition for the sale of the estate was dismissed on 11th November, 1903. The owner subsequently took proceedings in the Land Commission, and sold the estate to the tenants under the Act of 1903. At the time of the proceedings and sale in the Land Commission the estate was solvent:—

Held, affirming the decision of Ross, J., that the exceptions in section 48, sub-section 4, of the Land Act, 1903, did not apply, and that the bonus was payable.

APPEAL by the Treasury from the decision of Ross, J. [1909] 1 I.R. 205, where the facts are reported.

Serjeant O'Connor. K.C., and *Dudley White*, for the appellants.

Matheson, K.C. (with him, *E. S. Murphy*, who was not called on), for the respondent (the vendor):—

The arguments of counsel were substantially similar to those reported in the Court below.

THE MASTER OF THE ROLLS:—

I wish to guard myself expressly from any suggestion that the decision of Mr. Justice Ross might not be upheld on more grounds than the one so clearly stated in his judgment.

(1) Before THE MASTER OF THE ROLLS, PALLES, C.B., and HOLMES, L.J.

I think with my colleagues that it is absolutely unnecessary to enter on an examination of those grounds, or to indicate what they are. When they arise we should be all free to consider them. I am clearly of opinion that the order of Mr. Justice Ross can be upheld, and should be upheld, on the grounds stated in his judgment.

The Master of the Rolls.

PALLES, C.B.:—

I concur, for the reasons succinctly stated in the judgment of Mr. Justice Ross. The solution of the question depends upon the construction of a section which is self contained—that is one, the construction of which cannot be helped by reference to other parts of the Act. In the commencement of the section, we have that which we usually have not in an isolated section—the reason of the Legislature for passing it. Its object was to induce sales under, or in the words of the Act, "for the purpose of aiding the sale of estates under this Act."

It is matter of history that at the date of the Act there was almost an insuperable difficulty in effecting sales between landlords and tenants. That can be traced back to the time of Judge Flanagan, when practically all such sales had ceased. It seemed good to the Legislature to encourage such sales, and it became necessary to give landlords a premium to induce them to sell at prices at which it was probable that tenants would purchase. There was one class of case in which there was no necessity for the landlord's consent being required, that was where his estate was so incumbered that he had no interest in it. When, however, this was not clearly so, Judge Flanagan, and his successors, were in the habit of not permitting the estate to be sold at an unduly low price, without the landlord's consent. Whether this was in accordance with the rights of creditors, we have not to consider. This being so, the section proceeds, "The Land Commission may" (which in this context means "shall"), "in the prescribed manner, and at the prescribed time, out of advances by the National Debt Commissioners from the said fund, pay to the vendor of each estate *sold* a sum calculated at the rate of 12 per cent. on the amount of the purchase-money advanced under

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the Land Purchase Acts." Thus the sub-section deals only with estates sold. Everything within the sub-section is an estate sold, and the right to the percentage is given solely to owners of estates sold, and is so given by reason of the sale. If the section rested there, there would be nothing more to be said, and therefore it lies on the Treasury to show that the subsequent part of the section excepts the case before us from that general enactment. The section then proceeds in words that show that the Act contemplates this bonus being payable even in a case in which the estate may be so incumbered that its vendor is not entitled to receive, for his own use, any part of the rents or profits; thus recognizing, as I think, the practice in the Land Judge's Court which I have mentioned.

This brings me to the 4th sub-section, which has two limbs. The first embraces cases where there has been an actual sale by the Land Judge; the second is where, although the sale is not by the Land Judge, but through the Land Commission, an absolute order for sale has been made by the Land Judge.

In determining the meaning of the words "so circumstanced" in the second limb of the sub-section, if the words were not as clear as they are, we should be driven back by the policy of the Act to adjust matters so as to make the two limbs of the sub-section correspond. The first limb is transparently clear: "This section shall not apply to any estate sold by the Land Judge, where the estate *is* so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price." In this context "is" I think plainly refers to the date of the actual sale. There is no other time to which the existence of the "circumstances" can be referred. I then read "so circumstanced" in this first limb: as "so circumstanced" *at the time of sale.* I go on to the second limb: "or to any estate *so circumstanced* in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of this Act." What is the meaning of the words "so circumstanced" here? I think they have identically the same meaning as the same words have when they occur a few lines previously—"so circumstanced" *at the time of sale.*

I have read the judgment of Mr. Justice Ross; I agree with every word of it, and decide nothing else. A very important

question which arose in *Minhear's Estate* (1) was referred to; but in the view which I take of the present case it is one unnecessary for us to decide.

HOLMES, L.J.:—

I concur in the judgment of the Court for the reasons stated by Mr. Justice Ross. For my own part I think it is very unfortunate that in cases of this kind a successful litigant cannot get his costs. In 1857, Lord Campbell said (2) that the law on this point was not in a satisfactory state, and thought it desirable that it should be reviewed. We are very familiar with the Treasury appearing and raising important points which it is their duty to raise; but I think this should be done at the peril of costs if they fail, and with the corresponding right to receive costs if successful.

Solicitor for the appellants: *W. G. Towers.*
Solicitors for the respondent: *H. & W. Stanley.*

W. G.

(1) 38 Ir. L. T. R. 215.
(2) *Reg.* v. *Beadle*, 7 El. & Bl. 496.

Ross, J.
1909.
Nov. 15.

CRAIG *v.* RUSSELL.

Ecclesiastical lease—23 & 24 Vict. c. 150, ss. 26-28—Notice of period at which lease is renewable—Non-observance of statutory requirements—Forfeiture.

The Ecclesiastical Commissioners in pursuance of the 23 & 24 Vict. c. 150, s. 26, served notice on a tenant holding under a lease theretofore customarily renewable, fixing triennial periods as those at which the lease was thenceforth to be renewed. The payment of a renewal fine in 1886 equitably renewed the term of twenty-one years created by the lease as and from 25th December, 1886. No renewal fines were paid subsequently to 1886, nor was any renewal applied for within a period of three years and six months from the last renewal. The reversion was sold to the plaintiffs' predecessor in title, subject to the tenant's right of renewal under the 23 & 24 Vict. c. 150.

Held, that the tenant's right to a renewal was forfeited as and from a date three years and six months subsequent to the date of the last renewal.

TRIAL OF ACTION.

By renewal lease dated 7th June, 1876, and made between the Commissioners of Church Temporalities and W. R. Martin, the lands of Killyscolbane situate in the Diocese of Dromore and county Down, were demised to W. R. Martin for the term of twenty-one years from 25th December, 1875, at the yearly rent of £6 18*s.* 5*d.* The Ecclesiastical Commissioners had on the 5th June, 1862, by notice in writing, fixed triennial periods for renewal.

By deed poll dated 2nd October, 1878, under the authority of the Irish Church Act, 1869, the Commissioners of Church Temporalities in Ireland granted the said lands to James Craig, of Belfast, subject to the said indenture of lease. James Craig, who died on 20th April, 1900, by his will, dated 7th January, 1898, devised all the residue of his real estate, which included the said lands, to the plaintiffs.

No lease, by way of renewal or otherwise, of the said lands was, since the said lease of 7th June, 1876, granted to or taken out by the said W. R. Martin, or any person or persons claiming through or under him, or any other person or persons, but the renewal fines and fees, lawfully and properly payable for a

renewal of the said lease of 7th June, 1876, were paid from time to time down to and including the year 1886, the payment thereof in the said last-mentioned year, equitably renewing the said lease from 25th December, 1886, for the like term (namely, twenty-one years) for which the said lands had theretofore customarily been demised.

The said term of twenty-one years from 25th December, 1886, was not renewed, and expired on 25th December, 1907. The plaintiffs, by their statement of claim, claimed to establish their title to, and to have it declared that they were entitled to the said lands of Killyscolbane, free from the said indenture of lease, and any and every subsequent renewal thereof, and from all rights of renewal thereunder, and from all and every tenancy whatsoever of the defendants therein.

The defendant, Annie M'Cleery Russell, who was in possession of the said lands, claiming as lessee under the said lease of 7th June, 1876, and the subsequent equitable renewals thereof, by her defence and counter-claim pleaded that the plaintiffs' right to the said lands was subject to the defendant's right to have the said lease renewed on paying the moneys properly payable in respect of such renewal; that prior to the expiration of the said lease the defendant requested the plaintiffs to grant a renewal of the lease, and the plaintiffs agreed to grant such renewal on payment of the money properly payable in respect of such renewal; and the defendant counter-claimed a declaration that she was entitled to a renewal of the lease of 7th June, 1876, on payment of the moneys properly payable in respect of such renewal.

It appeared that before the expiration of the lease, which was equitably renewed in December, 1886, that is to say, in the year 1901, and afterwards, negotiations took place between the parties, and that the defendant, previous to the expiration of the said lease, applied to the plaintiffs for a renewal of the lease, but the parties were unable to agree as to the amount of moneys properly payable in respect of such renewal (1).

(1) The following are the material portions of the sections of 23 & 24 Vict. c. 150, referred to in the argument and judgment:—

Section 26: It shall and may be lawful for the said Ecclesiastical Commissioners, and they are hereby required, in respect of all lands and premises

Ross, J. 1909.

CRAIG v. RUSSELL.

S. L. Brown, K.C. (with him *D. M. Wilson, K.C.*, and *J. S. Edge*), for the plaintiffs:—

Prior to the Act 3 & 4 Wm. 4, c. 37, there was no right of renewal in tenants of ecclesiastical persons: *Hamilton* v. *Casey* (1). The lands in the present case were portion of the suppressed see of Dromore. The lands belonging to suppressed sees became vested in the Ecclesiastical Commissioners. The Act of Wm. 4, for the first time, gave the tenants of such lands a right of renewal.

The Ecclesiastical Commissioners, acting in pursuance of section 26 of the Act of 1860, fixed the times for the renewal of the lease under which the lands in the present case were held. The tenant did not, after 1886, pay any renewal fine, and her rights of renewal are now barred: *Copinger* v. *Spotten* (2).

John Bartley (with him *Whitaker, K.C.*), for the defendant:—

Where the tenant omits or neglects to make application to the

now vested in them, under the provisions of the Acts relating to the Temporalities of the Church of Ireland, and in respect of all lands and premises hereafter to become vested in them under the provisions of the said Acts, or of any Act which shall hereafter be made, within six calendar months from the times when such lands and premises, or the reversion thereof, shall have become vested in the said Commissioners, to fix and determine at what periods or intervals all and every the respective leases, &c., whereby any such lands and premises are or shall be held immediately from and under them, the said Ecclesiastical Commissioners (being a lease or instrument theretofore usually or customarily renewed and renewable), shall from thenceforth be renewable and renewed, and the said Ecclesiastical Commissioners shall cause notice in writing to be served upon the tenants holding under any such lease, &c., stating thereby the periods or intervals at which such leases or instruments respectively are thereafter to be renewable and renewed.

Section 27. After the service of such notice, in case any tenant [so holding] shall be desirous of obtaining any renewal of any such lease for the like term as shall have been thereby granted, and at, and under the like rent as therein reserved, it shall and may be lawful for such tenant, at any time within the period so fixed and determined as aforesaid, or within six calendar months from the expiration of such period, to apply to the said Ecclesiastical Commissioners for a renewal of such lease; and thereupon the said Ecclesiastical Commissioners shall, and they are hereby required to, grant to the respective tenants so applying for the same a renewal of such lease for the like term and at the like rent, for, and at which, the said lands or premises were demised by such lease; but, nevertheless, on payment to the said Commissioners of all

(1) [1894] 2 I. R. 224. (2) 3 L. R. Ir. 161.

Ecclesiastical Commissioners for a renewal, or fails to pay the renewal fine, section 28 of the Act of 1860 makes it mandatory on the Commissioners to grant a renewal: *Copinger* v. *Spotten* (1). Tables giving the modes of ascertaining the fines payable in such cases are to be found in Lyne on Leases. The Vice-Chancellor in *Copinger* v. *Spotten* (1) in effect says (p. 168) that the Commissioners were not at liberty, under section 28 of the Act of 1860, to insist on a forfeiture of the right of renewal.

D. M. Wilson, K.C., in reply:—

Supposing the tenants' rights under section 27 were gone, the Commissioners were at liberty to make any terms they liked, but they could not enforce them against the tenants, nor the tenants against the Commissioners. The Ecclesiastical Commissioners

arrears of rent reserved by such lease, and of the renewal fine [to be ascertained as in the section mentioned].

Section 28. In case any such tenant shall, at any time after the service of such notice, omit or neglect to make application to the said Ecclesiastical Commissioners for a renewal of such lease within the period so fixed and determined by said Commissioners as aforesaid, or shall not pay to the said Ecclesiastical Commissioners such fine or fines for renewal, &c., and rent and arrears of rent, &c., within one calendar month after the amount of the fine or fines so ascertained shall have been notified by the said Ecclesiastical Commissioners to such tenant, his or her agent, then, and in every such case, it shall and may be lawful for the said Ecclesiastical Commissioners to procure a valuation of the said lands and premises, to be made previous to the grant of any renewal or new lease thereof, and require such renewal fine as they shall think reasonable, having regard to such valuation.

By the Irish Church Act, 1869 (32 & 33 Vict. c. 42), s. 11, from and after the passing of the Act, all property, real and personal, at the date of such passing, vested in or belonging to the Ecclesiastical Commissioners for Ireland, was transferred to and vested in the Commissioners of Church Temporalities in Ireland, subject to all tenancies and rights (including tenants' rights of renewal) affecting same.

By section 34, the Commissioners of Church Temporalities were empowered, after 1st January, 1871, to sell the property vested in them; and it was provided that any person purchasing from the Commissioners should hold the lands purchased by him subject to all tenants' rights of renewal to which same were subject in the hands of the Commissioners at the time of such sale.

(1) 3 L. R. Ir. 161.

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could not sell till 1869, therefore it was necessary that the statute should give them powers of renewal after forfeiture. The Vice-Chancellor in *Copinger* v. *Spotten* (1) states that the Commissioners were at liberty under the 28th section of the Act of 1860 to insist, not on a forfeiture, but on certain terms of renewal. The 28th section has nothing to say to forfeiture, but deals with terms of renewal. As to relief by Equity in cases of forfeiture, see *Hussey* v. *Domvile* (2).

Ross, J.:—

The case, as it has now developed, turns on a very small point. Before the Act 3 & 4 Wm. 4, c. 37, it is plain that there was no obligation on bishops to renew leases, and there was no right of renewal in their tenants. The Act of Wm. 4, as amended by the Act of 1860, confers on the tenants a right of renewal when certain conditions have been complied with.

Under the Act of 1860 (23 & 24 Vict. c. 150) the Commissioners were by section 26 required to fix the periods at which leases of lands held immediately from and under them should thenceforth be renewable and renewed, and to give notice in writing to the tenants, stating these periods.

The lands, the subject-matter of the present action, formed portion of the suppressed see of Dromore. By notice in writing, dated 5th June, 1862, the Ecclesiastical Commissioners, acting in pursuance of the provisions of section 26, gave notice to the tenant of these lands that the period fixed for the renewal of the lease under which the lands were held was the 29th September, 1862, and that all subsequent renewals should be taken out at intervals not exceeding three years from the commencement of the term granted by the last preceding renewal.

It is not contended that the fixing of these periods was *ultra vires*. The renewal fine last paid equitably renewed the term of twenty-one years created by the lease of the 7th June, 1876, made by the Commissioners of Church Temporalities to W. R. Martin, as from the 25th December, 1886, and no application for renewal was made within three years and six months from the

(1) 3 L. R. Ir. 161. (2) [1900] 1 I. R. 417.

latter date, and, consequently, the statutory right of renewal was absolutely gone on the 25th June, 1890. Ought a Court of Equity to interfere? I know of no authority suggesting that a Court of Equity can interfere where there is a time limit fixed by statute. Consequently, the application not having been made nor the renewal fines paid within the fixed time, the right of renewal is gone.

Mr. Bartley next contended that, under section 28, the tenant, where he omitted or neglected to make application within the time fixed by the Commissioners, got a right to renew, but on different terms. The view I take of section 28 is, that in case a forfeiture has occurred, the Commissioners *may* allow the tenant to remain on, but, if they do, they may fix the fine in another way. I do not think the Vice-Chancellor's judgment in *Copinger* v. *Spotten* (1) can support the contention that the right of renewal is not forfeited at the end of the statutory period.

The contention of the defendant seems to rest on a misconstruction of the Vice-Chancellor's judgment. I am told that the points on which I decide this case are not those on which the plaintiff rested his case before the action commenced, but I must decide according to law, not according to letters written before the parties had looked fully into their position.

The defendant's right to a renewal was gone in 1890. I therefore hold that the plaintiffs are entitled to the declaration claimed in the statement of claim with the costs of the action. I dismiss the counter-claim with costs.

Solicitor for the plaintiff: *Richardson & Craig.*

Solicitor for the defendant: *W. Graham & Sons.*

D. M. S.

(1) 3 L. R. Ir. 161.

Barton, J.
1910.
Jan. 17, 31.

JONES *v.* BAILEY.

(1909. No. 1003.)

Will—Construction—"Securities and moneys invested"—Land Purchase Acts—Sale to tenant—Death of landlord—Subsequent sanction of contract for sale—Conversion.

By his will a testator devised three species of property under the following descriptions:—(1) "all my real and freehold estates over which I shall have a disposing power at the time of my death whatsoever or wheresoever; (2) "all my leasehold estates held for any term of years, and all my stocks, funds, securities, and moneys invested and yielding income"; and (3) "all the residue of my personal estate and effects whatsoever and wheresoever."

Testator was the absolute owner of certain interests in land in respect of which an originating application for sale under the Land Purchase Acts had been lodged with the Land Commission, together with agreements for purchase, in January, 1905. He died in August, 1905. After his death the sale was sanctioned and carried out, and the purchase-money was paid to his executors.

Held, that the proceeds of sale in the hands of the executors were not included in the bequest of "securities and moneys invested and yielding income"; and that same being proceeds of land duly converted into money prior to testator's death, did not pass under the devise of his "real and freehold estate," but fell into the residue, and passed to his residuary legatee.

ORIGINATING SUMMONS.

By his will dated 13th December, 1877, Alexander William Bailey, the testator, devised "all my real and freehold estates over which I shall have a disposing power at the time of my death, whatsoever and wheresoever, other than and except those vested in me upon trust or in mortgage," to his trustees to the uses therein declared. He further gave and bequeathed "all my leasehold estates held for any term or terms of years, and all my stocks, funds, securities, and moneys invested and yielding income," unto his said trustees upon the trusts therein declared. Under such trusts, in the events that happened, the defendants Gonville Saunders and Finlay Saunders were beneficially entitled.

The testator further bequeathed "all the residue of my personal estate and effects whatsoever and wheresoever" unto his wife for her sole and absolute use. He subsequently made four codicils, which did not affect the question now in issue.

On the 16th day of January, 1905, the testator lodged in the Court of the Irish Land Commission (Estates Commissioners) an originating application for the sale of the lands of Killycat, part of the lands of Shillanmore, Lettan Leane, and Doone, and on or about the same day lodged in Court agreements with the tenants on the said lands for the purchase of their holdings. At the time of the lodgment of the originating application and agreements the testator was the absolute owner in fee-simple or fee-farm of one undivided fifth part of all the above-mentioned lands except a portion of the lands of Doone, of which he acquired the fee-simple in his life-time during the pendency of the proceedings for sale. The testator died on the 11th August, 1905. The purchase-money from the sale of all the lands was allocated by the Court of the Irish Land Commission on the 19th April, 1909, and a sum of £902 0*s.* 7*d.*, being the net residue of the purchase-moneys of the said undivided fifth share of the said lands and of the absolute interest in the said part of the lands of Doone, was paid to the executors of the said William Alexander Bailey, the testator. The question now to be determined was, whether the said sum of £902 0*s.* 7*d.* was—(1) subject to the trusts declared concerning the testator's real and freehold estates; or (2) subject to the trusts declared concerning the testator's "leasehold estates and stocks, funds, securities, and moneys invested and yielding income"; or (3) formed portion of the testator's residuary personal estate.

A. V. Matheson, for the trustees.

Garrett Walker, K.C., for Mrs. Bailey, the residuary legatee:—

The purchase-money of the sold lands, of which the testator was owner in fee, allocated after his death, comes within the residuary gift and passes to the residuary legatee. The property had been converted into personalty at the date of testator's

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death: *In re Doyle's Estate* (1); *In re Sherlock's Estate* (2). As between the real and personal representatives of the testator, the contract having been sanctioned and the sale completed, conversion of the lands into money was effected as from the date of the agreement for sale: see the observations of Meredith, J. and Holmes, L.J., at pp. 584, 589, of the report: *Weeding* v. *Weeding* (3). The last-mentioned case shows that the real representative would be entitled to the interest in lieu of rent until the actual allocation takes place; and it appears impossible to suggest that land agreed to be sold to the tenants, whose interest in lieu of rent until allocation is payable to the devisee, could be considered as falling within the description in the will of "securities" or "moneys invested and yielding income."

In cases where there was no residuary gift, the Courts in dealing with personal property have often given an enlarged meaning to language of circumscribed character, for the Court strives to prevent an intestacy; but that principle does not apply where there is a residuary gift.

The last codicil (executed after the contract for sale), could not operate to set up the devise adeemed by the conversion of the property.

Sweetman, for the defendants, other than Mrs. Bailey:—

Very possibly in consequence of the decision in *Sherlock's Estate* (2) there is a great deal to be said in favour of there being a conversion of some kind. But a question arises as to what is the form in which the lands have been converted. The general scheme of the will must be looked to. The testator intended to tie up all his realty, leaseholds and other productive securities, but he allows such matters as cash and specific articles, which it would be extremely inconvenient to tie up, to fall into the general residue. If there was a conversion of these lands, they fell into the reproductive funds and not into the merely residuary fund, which was intended to capture cash and the equivalents of cash.

(1) [1907] 1 I. R. 204. (2) [1899] 2 I. R. 561.
(3) 1 J. & H. 424.

Section 35 of the Land Act of 1896 provides for the payment of interest, when an agreement for sale has been signed. The death took place before the lands were vested, and at the time of the death interest was being paid under the section. The purchase-money falls under the head both of "securities" and of "moneys invested." The testator would have been much surprised to hear he had turned his lands into money, but would have been even more surprised to hear that the fund was neither a security nor bearing interest. The language ought not to be strained in favour of a conversion: *Callow* v. *Callow* (1); *Horne* v. *Redfearn* (2); *Barry* v. *Harding* (3); *Hopkins* v. *Abbott* (4); *Archibold* v. *Hartley* (5).

BARTON, J. :—

The testator by his will, dated in 1877, gave three species of property under the following descriptions :—(1) "all my real and freehold estates over which I shall have a disposing power at the time of my death, whatsoever and wheresoever"; (2) "all my leasehold estates, held for any term of years and all my stock, funds, securities, and moneys invested and yielding income"; and (3) "all the residue of my personal estate and effects, whatsoever and wheresoever." He was the absolute owner, in fee-simple or fee-farm, of certain interests in land in respect of which he lodged with the Irish Land Commission, on the 16th January, 1905, an originating application for sale under the Land Purchase Acts, together with the tenants' agreements for purchase. He died on August 11th, 1905. No further steps had been taken prior to his death towards carrying out the sale. After his death the sale was sanctioned and carried out. The purchase-money, £902 0*s.* 7*d.*, is now in the hands of his executors; and the Court is asked to decide under which of the before-mentioned descriptions of property the purchase-money falls.

In the first place, this money did not, in my opinion, pass as part of the testator's "real and freehold estate." A binding contract by a testator for the sale of land, though not completed

(1) 42 Ch. D. 550.
(2) 4 Bing. N. C. 433.
(3) 1 Jo. & Lat. 475.
(4) 44 L. J. Ch. (N. S.) 316.
(5) 21 L. J. Ch. (N. S.) 399.

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at his death, converts the lands. That rule has been applied to conditional contracts in which there was an option to purchase the land, which was not exercised, or to be exercised, by the vendor until after the death; and has been extended to agreements for sale under the Land Purchase Acts, not sanctioned and carried out until after a testator's death: *In re Doyle's Estate* (1); *In re Gowing's Estate* (2); *Settled Land Acts and Longworth* (3); and the judgment of Holmes, L.J., in *Re Sherlock's Estate* (4).

Mr. Sweetman, in an exceedingly able argument, contended that these moneys passed under the second species of the testator's property. There have been cases in which converted property of this kind has been caught by words in the will which happened to aptly describe such property. In *Lysaght* v. *Edwards* (5) a testator devised all his real estate which at his death might be vested in him "as trustee." Afterwards he made a contract for the sale of part of his real estate, and died before completion. Jessel, M.R., held that the devise included the lands, of which at the time of his death he was, as vendor, a constructive trustee. It is contended, in the present case, that these moneys passed under the word "securities." Mr. Sweetman relied upon *Callow* v. *Callow* (6), in which Chitty, J., held that a bequest of "all securities for money" included money due to the testator, in respect of which he had a vendor's lien for unpaid purchase-money, and threw some doubt upon *Goold* v. *Teague* (7)—a case which had already been queried by Lord St. Leonards and by Mr. Dart. For our present purpose I shall assume, without expressing an opinion on the point one way or the other, that, if this had been an ordinary contract of sale of land, *Callow* v. *Callow* (6) would apply to the present case. But this was not an ordinary contract of sale, but a contract of sale under special statutory conditions, into which the element of a lien for unpaid purchase-money, in the ordinary sense of that expression, did not enter.

(1) [1907] 1 Ir. R. 204, 207.
(2) 42 Ir. L. T. R. 56.
(3) 43 I. L. T. R. 33.
(4) [1899] 2 I. R. 561, 591.
(5) 2 Ch. D. 499.
(6) 42 Ch. D. 550.
(7) 7 W. R. 84.

The purchase-money, in the case of a sale under the Land Purchase Acts, is not provided by the purchaser, but by the State. When the vesting order is made, the land is cleared of its obligations to the vendor, who does not look so much to any lien or equitable charge upon the lands, as to the obligation which is imposed by statute upon a Department of State to advance the purchase-money. The State, rather than the vendor, is concerned with the security which the land affords. The testator in this case had no such lien for unpaid purchase-money as could answer to the name "securities."

It follows that the moneys passed as part of testator's residue. As the residuary legatee is also entitled for her life to the rents and profits of the real estate, no question arises as to the intermediate income which accrued between the death of the testator and the completion of the contract.

Solicitors for the defendant Mrs. Bailey: *Stephen Gordon & Son.*

Solicitors for the other defendants: *Geo. D. Fottrell & Sons.*

Solicitors for the trustees: *Stephen Gordon & Son.*

R. W. L.

Barton, J.
1910.
Jan. 26, 31.

SHIELDS *v.* SHIELDS.

Will—Construction—Gift to wife with power to deprive child for disobedience—Legatee taking absolute interest beneficially or as trustee—Implied gift—Life estate to wife with remainder to children—Power of deprivation.

By his will a testator provided as follows :—" I will, devise, and make over to my wife all real and personal property which I may hold in A or elsewhere. I do not wish to deprive any of the five children we have of an equal share and share alike, but that their mother should have power at any time on their disobeying her, whom I leave as guardian over them, to deprive them of the whole or any portion of their share. He appointed his wife and another executors."

He left a widow and five minor children surviving him.

Held, that the testator gave the whole of his property to his wife for life, and after her death to the children, with power to his wife at any time during her life to deprive any child of the share, to which he or she would otherwise be entitled at their mother's death, for disobedience.

ORIGINATING SUMMONS.

By his will dated 16th October, 1900, Patrick Shields provided as follows :—" I will, devise, and make over to my wife Mary (Roontree) Shields all real and personal property which I may hold in Altmore or elsewhere. I do not wish to deprive any of the five children we have of an equal share and share alike, but that their mother should have power at any time, on any of them disobeying her, whom I leave as a guardian over them, to deprive them of the whole or any portion of their share. I hereby appoint my wife, Mary Shields, and my parish priest, Rev. Peter Slevin, as my lawful executors."

Testator died on the 4th November, 1900, and probate of his will was, on the 22nd May, 1901, granted to the executors therein named. The testator left five children surviving him, and at the date of his death they were all minors, the eldest being then fourteen years of age. The gross assets of the testator, consisting principally of chattels real, were sworn at £1022 11*s.* 8*d.*

The widow, Mrs. Shields, took possession of the assets, and became bankrupt in November, 1908.

On the 27th October, 1909, a summons was issued by Eileen Shields, daughter of the testator, asking for an order for the administration of his real and personal estate, and to have the trusts of his will construed and carried into effect.

M'Loone, for the plaintiff:—

The widow was only a trustee for the children with a power of depriving any one of them, in consequence of disobedience, of the whole or part of his or her share. The words are as simple as could be used to vest in the widow the bare legal estate. The words usually added when the intention is to convey the beneficial interest, *e.g.*, absolutely, for her own use and benefit, beneficially, &c., are absent.

The rule of construction to be adopted in these cases is this, "Read the will without paying attention to legal rules, and for the purpose only of seeking the testator's intention and the words used": *Comiskey* v. *Bowring Hanbury* (1). Applying this rule here it is obvious that the testator "did not wish" to deprive his children of his property. There is no difficulty in executing the trust. The widow was to exercise a power of deprivation if a child disobeyed her. Such a provision is inconsistent with absolute ownership. [BARTON, J.—If the widow exercised the power of deprivation, who would be entitled to the share forfeited?] It would pass as on intestacy.

In *Hall's Trusts* (2), which is a similar case, it was held that there was a gift of the capital sum in question to the children. As to the principles on which a trust should be deduced from the language of the testator, see the observations of Rigby, L.J., in *Williams* v. *Williams* (3), and *Alexander* v. *Burley* (4) shows that the Court is to be guided by the intention apparent on the will and not by any particular words. The decision in that case supports our contention. *Knight* v. *Knight* (5) shows what are the requisites

(1) [1905] App. Cas. 84.
(2) 23 L. R. Ir. 130.
(3) [1897] 2 Ch. 2[illegible], 29.
(4) W. N. [1909] 253.
(5) 3 Beav. 148.

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for the creation of a trust. *Clancarty* v. *Clancarty* (1) is a very different case from the present, and turned upon different considerations.

Serjeant O'Brien, K.C., for the assignee in bankruptcy :—

The logical construction of this will is, that the widow became beneficially entitled to the whole little property of the testator. He never intended to leave her starving and to have the £1000 invested till the last child attained twenty-one. This construction is more in accordance with the language used. The widow is intended to be the absolute owner. *In Clancarty* v. *Clancarty* (1), notwithstanding the words used, it was held that the testator had no intention to exclude the widow from beneficial enjoyment of the property, or to create a precatory trust. Similarly in this will no such intention can be shown from the whole will and the surrounding circumstances. There is no gift here to the children. Mr. M'Loone's argument is really demolished by the House of Lords' decision in *Comiskey* v. *Bowring Hanbury* (2). See Lord Halsbury's observations at p. 88. Here she has a complete power of disposition, and there are no such mandatory words as "I hereby direct." Counsel for the other side wants to introduce an *implied* gift to the children. He has to read it "and in the event of her not appointing then to them share and share alike"; and if one of them disobeys and is deprived, then there is an intestacy as to that one's share. There cannot be a trust, because it may defeat its own object. In *Alexander* v. *Burley* (3), it was held that a trust was created, but that was manifest on the construction of the will and codicils. In *Haly's Trusts* (4) there was a mandatory direction, and there was no question as to whether or not these were words of precatory trust. *Knight* v. *Knight* (5) has no application.

R. J. Doyle, K.C., for the widow.

(1) 31 L. R. Ir. 530.
(2) [1905] App. Cas. 84.
(3) W. N. [1909] 253.
(4) 23 L. R. Ir. 130.
(5) 3 Beav. 148.

BARTON, J.:—

The testator left a widow and five infant children. He left no real estate. His assets consisted principally of three chattel farms, and were sworn at £1022 11*s.* 8*d.* gross, or £649 5*s.* 3*d.* net.

His will runs as follows:—[His Lordship read the will].

The widow went into possession of his assets in 1901, and became bankrupt in November, 1908. The parties to this summons are, on the one hand, her children, and, on the other hand, her assignees in bankruptcy.

Upon behalf of the children it is contended that they are entitled beneficially to the whole of their father's estate, and that their mother had no interest except as trustee with a power of deprivation. I cannot see my way to adopt that construction. Executors were appointed; and the whole of the net property of the testator is given to the widow in terms which are sufficient to carry the whole beneficial interest, unless they are cut down by what follows. What follows shows an intention to give a beneficial interest to the children, and a power of deprivation "at any time" (*i.e.* at any time during her life) to the widow. But there are no words of trust; and the language of the will does not justify me in coming to the conclusion that the testator intended that his wife, in whom he obviously had entire confidence, should, during her whole life, be no more than a family drudge, with heavy burdens and responsibilities, and without any beneficial interest in the property.

On the other hand, it is contended, upon behalf of the widow's assignees in bankruptcy, that the children did not take any beneficial interest at all. I cannot see my way to adopt that construction. It cuts out more than half of the operative part of the will. The testator intended that his children were to have a beneficial interest, share and share alike, of which his wife was to have power at any time during her life to deprive them. The Court will not lightly strike out half the will as meaningless and inoperative.

It seems to me that there are three separate expressions of the testator's intention to be found in the will, which are capable

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of being reconciled without unduly straining its language. Firstly, there is a gift of the whole net property to the widow, which is unqualified, except by what follows. Secondly, there is an implied gift of the same property to the five children, share and share alike, which is unqualified, except by what precedes and by what follows. Thirdly, there is a power given to the wife at any time during her life to deprive any child of his or her share for disobedience. The word "deprive" is used twice in the will. When the testator says that he does not wish to deprive the children of their shares, he is referring to shares which cannot come to them until after his death. Similarly, in the case of the power given to his wife, he may have used the word "deprive" in the same prospective sense. I reconcile these provisions in the will by holding that the testator gave the whole of his net property to his wife for life, and after her death to the children, and gave to his wife a power at any time during her life to deprive any child of the share to which he or she would be entitled at her death (1).

Solicitor for the plaintiff: *John L. M'Dowell.*
Solicitors for the assignee in bankruptcy: *J. L. Scallan & Co.*
Solicitor for the widow: *J. Moran.*

R. W. L.

(1) See also *Mill* v. *Mill* (Ir. Rep. 11 Eq. 158, 159), and *Bradshaw* v. *Bradshaw* ([1908], 1 Ir. 288). [REP.]

CALLWELLS, LANDLORDS; REILLY, TENANT (1).

Appeal.
1910.
Jan. 26,
Feb. 11.

Landlord and Tenant—Land Law (Ireland) Acts, 1881, *ss.* 5, 8; 1896, *s.* 3—*Resumption of holding by landlord for building—Expiration of first statutory term—Present tenancy.*

After the expiration of a first statutory term in a holding, and pending the present tenancy thereupon ensuing before a second statutory term is created, an application by a landlord not coming within the exceptions (*a*) and (*b*) of section 8 of the Act of 1881, to resume possession of a holding for the good of the estate, viz., for building purposes, cannot be entertained.

Diss. HOLMES, L.J.

APPEAL by the landlords from an order of Fitz Gerald, J., dated the 1st December, 1909, affirming a decision of a sub-commission (Messrs. Tuckey and Millar), dated the 28th July, 1909, dismissing their application for resumption of the tenant's holding at Ballybrack, county Dublin, containing 21A. 1R., held at a yearly rent of £45, "for the good of the estate, viz., for building purposes." The grounds of the decisions of the sub-commission and of Fitz Gerald, J., were, that a first statutory term was by order of the 20th September, 1883, created in the holding, which had expired prior to the originating notice of application for resumption, and that a second statutory term in the holding had not been created or applied for. This was the only question raised on the appeal. The facts were undisputed.

Chaytor, K.C. (with him *De Renzy*), for the landlords.

Prior to the passing of the Act of 1881, a landlord had his right at Common Law to resume the holding for any purpose by serving an ordinary notice to quit. The Act of 1881 undoubtedly invaded this right, but preserved it to this extent, viz., that if the landlord required the holding for the *bona fide* object of building,

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1910.

CALLWELLS, *Landlords;* REILLY, *Tenant.*

he should be entitled to resume it once the first statutory term had expired. The object of this was clear, viz., that the tenant was to have undisturbed possession for at least fifteen years, but after that period the landlord was entitled to resume for the particular purpose specified in the Act.

The contention of the other side is that the effect of section 3 of the Act of 1896 is to postpone this right of resumption—given in the clearest terms—beyond the period of fifteen years, or perhaps for ever, for unless the tenant serves notice to fix a fair rent for a second statutory term—which he will not do—or the landlord demands an increased rent—which he does not want—so as to enable him to apply to fix a fair rent, no application can be made to the Court to resume.

For such a startling result, amounting almost to a repeal of section 5 of the Act of 1881, one would expect to find some indication of intention by the Legislature in section 3 of the Act of 1896 to alter the existing law. But there is no such indication; on the contrary, section 3 shows on its face the clearest indication to leave matters as they were, and to preserve the existing law. It is true that under section 5 of the Act of 1881 the application for resumption is to be made during a statutory term, but the right to resume is one of the conditions referred to in section 3 of the Act of 1896, which are to continue after the statutory term.

The provision in section 8 of the Act of 1881, restricting the right of resumption until after the first fifteen years, is not a condition at all within the meaning of section 3 of the Act of 1896, but merely a fetter on a condition, the condition being the right of resumption. This view is borne out by comparing the headings of Parts I and II, respectively, of the Act of 1881.

Part I (which includes section 5) is entitled "Ordinary conditions of tenancy," whereas Part II (which includes section 8) is merely entitled "Intervention of Court."

Even assuming the provision in sect. 8, prohibiting resumption during the first fifteen years, is a condition of the tenancy, the words "same conditions" in section 3 of the Act of 1896 mean the same conditions which are still subsisting *and capable of taking effect.*

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The condition prohibiting resumption is spent, for the first statutory term has long since expired. The opening words, "on the expiration of a statutory term," in section 3, show the section was never intended to apply to a condition that never was intended to extend beyond the first statutory term. By restricting the section to conditions which were still capable of taking effect, a reasonable interpretation is given to the section, whereas the interpretation contended for by the other side renders the law of resumption unintelligible and unworkable.

Healy, K.C., and *Sweetman*, for the tenant:—

This is an attempt to confiscate the tenant's property without statutory authority, and to evade the procedure which would result in adequate compensation. The right of resumption given to the landlord by section 5, sub-section 6, of the Land Act (Ireland), 1881, is expressly limited to "the continuance of a statutory term," and ceases on the expiration of the term. In the alternative, if the right of resumption is preserved after the expiration of the statutory term under the operation of section 3 of the Land Act (Ireland), 1896, it must be the same right of resumption as existed during the preceding statutory term, with all its incidents, which term is here subject only to the modified right of resumption given by section 8, sub-section 3, of the Act of 1881. The modification imposed by the latter part of that sub-section is a condition, and an integral part of the right of resumption. The whole sub-section must be read together, and if any part of it is to be "continued" in its effect by section 3 of the Act of 1896, the whole must be so "continued." It is admitted that the landlord is not entitled to resume under the limited right given by section 8, sub-section 3, of the Act of 1881.

THE LORD CHANCELLOR:— Feb. 11.

This appeal from Mr. Justice FitzGerald raises a short but important question of law on the construction of the 5th and 8th sections of the Land Act of 1881, taken in connexion with the 3rd section of the Act of 1896, and the case involves the true construction of those sections taken together.

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The holding consists of 21A. 1R. 8P. of land, situate at Ballybrack, in the county of Dublin, held from year to year, at a rent of £45, fixed by the Court as a judicial rent. This, the first statutory term, was created by an order of the Land Commission, dated 20th September, 1883. This statutory term expired on the 29th day of September, 1898, and no fresh originating notice has been served by either landlord or tenant; but it is open to the tenant to serve it, and the landlord can do the same after demanding an increase of rent. On the 8th March, 1909, the landlord served an originating notice for an order authorizing the resumption of the holding for building purposes. That application came on to be heard before a sub-commission on the 28th July, 1909, when it was dismissed. The order recites as the ground—"It appearing that a first statutory term was by order of 20th September, 1883 (affirmed on appeal), created in the said holding, and that the said statutory term expired prior to the said originating notice, and that a second statutory term in the said holding had not been created or applied for." This order was affirmed by Mr. Justice FitzGerald on appeal.

It cannot be disputed that a landlord has no power to resume or enforce resumption of a holding, save by express contract or under some statutory power. Contract here there was none, and the statutory power is that created by the sections 4, 5, and 8 of the Act of 1881.

Section 4 of the Act of 1881 is the one which provides for the creating of a statutory tenancy consequent upon the landlord demanding an increase of rent from the tenant, which the tenant accepts, and then the statutory term endures for fifteen years, and is deemed to be a tenancy subject to statutory conditions which are mentioned. If the tenant does not accept the increase of rent, other provisions for the benefit of the tenant are contained in the Act, and sub-section 4 of section 4 enacts that "the tenant of a present tenancy may in place of accepting or declining such increase apply to the Court in manner hereafter in this Act mentioned to have the rent fixed"—*i.e.* mentioned in section 8. The statutory conditions that arise under section 4 are mentioned in section 5, and one of them is that "during the continuance of a statutory term in a tenancy, save as hereinafter provided, the Court may,

on the application of the landlord, and upon being satisfied that he is desirous of resuming the holding, or part thereof, for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate, including the use of the ground as building ground" (and certain other purposes mentioned), "authorize the resumption thereof by the landlord upon such conditions as the Court may think fit, and require the tenant to sell his tenancy in the whole or such part to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant." This deals with and disposes of resumption when the statutory tenancy arises under section 4.

The 8th section deals with cases where the Court is applied to for the purpose of having the fair rent fixed, either by the tenant under sub-section 4 of the 4th section, or by landlord and tenant jointly, or by the landlord, in the absence of agreement, after demand of an increase.

The section is headed—"INTERVENTION OF COURT."

Sub-section 3 is as follows:—"Where the judicial rent of any present tenancy has been fixed by the Court, then until the expiration of a term of fifteen years from the rent day next succeeding the day on which the determination of the Court has been given (in this Act referred to as a statutory term) such present tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions, and having the same incidents as a tenancy subject to statutory conditions consequent on an increase of rent by a landlord, with this modification, that, during the statutory term in a present tenancy consequent on the first determination of a judicial rent of that tenancy by the Court, application by the landlord to authorize the resumption of the holding or part thereof by him for some purpose having relation to the good of the holding, or of the estate, shall not be entertained by the Court, unless:—

(*a*) Such present tenancy has arisen at the expiration of a judicial lease, or of a lease existing at the time of the passing of this Act, and originally made for a term of not less than thirty-one years; or

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(*b*) It is proved to the satisfaction of the Court that before the passing of this Act the reversion expectant on the determination of a lease of the holding was purchased by the landlord or his predecessors in title, with the view of letting or otherwise disposing of the land for building purposes on the determination of such lease, and that it is *bona fide* required by him for such purpose.

It will be seen that after the Court has been appealed to and acted, the right of resumption is different from what it was under section 5 in this respect, that application for resumption cannot be entertained by the Court, save under the conditions mentioned at (*a*) and (*b*), attached to the sub-section.

It was, perhaps, not unnatural that larger effect should be given to a statutory term created by the Court judicially; at all events the result is so.

The Act of 1887, section 1, applied the prohibition against resumption during the statutory term to a lessee's case who became a present tenant under section 1.

So the legislation remained till the Act of 1896 was passed; and it is plain that in this case as the statutory term was created by the intervention of the Court, no application to authorize resumption could be made during its continuance.

Section 3 of the Act of 1896 is the one upon which, bearing in mind and applying the antecedent legislation which I have referred to, the present case depends.

Section 3 enacts—"(1) On the expiration of a statutory term in a present tenancy, the tenancy shall continue a present tenancy subject to the same rent and conditions (including the statutory conditions) as during the statutory term, until the tenancy is determined, or a new statutory term for the holding begins, and an application to fix a fair rent may be made at any time during such continuance of the tenancy; and no objection to such application shall be allowed which could have been but was not taken upon the application for a previous judicial rent, or being then taken, was over-ruled.

"(2) Where the Court, on application, fix a judicial rent for a holding, the judicial rent and statutory term shall begin from the

gale day next after the date of the application; or, if a preceding statutory term is then current, from any later day on which that statutory term expires."

The statutory term to which this holding was subject expired in 1898, and at that date the statutory term was a judicial one, and the statutory conditions to which it was subject were those mentioned in section 5 and section 8 of the Act of 1881, which, taken together, prohibited an application for resumption, except for the specific limited purposes mentioned, which do not include building; and the tenancy which has survived the statutory term is, on its expiration, bound by that condition, and must continue to be bound by it, till a new statutory term for the holding begins.

It follows, in my opinion, that till then an application such as made here by the landlord cannot be entertained.

It was said that he makes the application under section 5 of the Act of 1881; but this was a judicial tenancy created by the intervention of the Court under section 8, and I do not see how it could be sustained under clause 5, rejecting the conditions applicable to it. It cannot be made at Common Law, and can only be sustained under a statutory provision. The landlord is in a dilemma. He must say it is under a statutory condition he applies, but the real condition prohibits him. If there is no statutory condition applicable because of the expiration of the statutory term, then there is no jurisdiction whatever to entertain his application.

No doubt he can fix a fair rent, and create a new statutory term, and then apply; but for obvious reasons he does not wish to adopt that course, as the rent might be reduced and the compensation increased. For that reason he has made this experiment, which, in my opinion, we must pronounce unsuccessful, and affirm in result the dismiss made by the sub-commission and Judge Fitz Gerald.

HOLMES, L.J.:—

The result of this appeal depends upon the construction to be given to the Land Law (Ireland) Act, 1896, section 3, sub-sect. 1, which was passed to correct, or rather to supplement,

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certain provisions of the Land Law (Ireland) Act, 1881. The last-mentioned statute altered fundamentally the rights and obligations of landlords and tenants in Ireland, and changed the relations in which they had theretofore stood to each other. As was to be expected in such a complicated and novel piece of legislation, it was found after its enactment that difficulties arose from omissions arising from oversight or from a failure to provide for circumstances that were likely to occur. A remarkable instance of this is to be found in the provisions relating to what is called a statutory term, which are perhaps the most important portions of the Act. Present tenants were given the right to obtain, by an order of the Land Commission, these terms at a fixed rent, to continue for a period of fifteen years. During the continuance of this term the tenant could not be compelled to pay a higher rent or to quit the holding of which he was tenant, except for the breach of one or more of certain prescribed conditions referred to as statutory conditions.

The common law mode of putting an end to a yearly tenancy by means of a notice to quit was thus put an end to during the term unless one of these conditions was broken. In such case, the landlord could serve the notice; but section 13 entitled the tenant after its service to apply to the Land Commission for an order restraining the landlord from taking further proceedings to enforce it; and on the hearing of such application, the Court was given a wide jurisdiction to relieve the tenant, upon his complying with certain terms, from the liability of his being compelled to quit his holding for breach of the condition. In addition to the statutory conditions to which the holding is liable during the continuance of the term, it is made subject to a right on the part of the landlord to apply to the Court for an order authorizing him to resume the holding or part thereof for certain specified purposes; and the Court is empowered on the hearing of such application to authorize resumption upon such terms as it may think fit, including full compensation to the tenant. I have not attempted to state all the conditions and incidents of a statutory term; but what I have said enables me to indicate the oversight or omission which section 3, sub-sect. 1, of the Act of 1896 was intended to remedy. It will be observed that all the conditions

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(whether statutory or not) and other incidents of a statutory term only apply during its continuance. Once the fifteen years expire, they disappear unless or until another statutory term is created. It has even been suggested that the fair rent ceases with the term, and that the previous rent takes its place. I do not agree with this, as I would be prepared to hold, irrespective of the Act of 1896, that the fair rent would continue until legally altered. But there is no doubt that the common law right of the landlord to serve a notice to quit at his own discretion would revive, and that the tenant would lose all the protection against the arbitrary or unreasonable exercise of this right which he enjoyed during the continuance of the term. No doubt on the creation of a new statutory term, all the provisions and incidents attaching thereto would be restored; and it would seem that the Legislature in passing the Act of 1881 assumed that there would always be a succession of these terms in a holding that was once subject thereto. What was overlooked was the by no means unlikely case that a fair rent having been once fixed at the instance of either landlord or tenant, both parties, being satisfied with it at the end of the fifteen years, would prefer to allow the rent to remain as it was to incurring the expense and trouble of another application to the Court. This oversight might have been, and probably in the absence of amendment would have been, a serious inconvenience in the circumstances I have mentioned.

I shall not take the case of an unreasonable landlord serving a notice to quit without any cause, and thus obliging the tenant to have a statutory term created to defend himself from eviction. I take a landlord who believed that the tenant had broken what was during the term a statutory condition, and who in consequence thereof served a notice to quit. The tenant in such case would have no defence or protection unless on receiving the notice he were to have a new statutory term created. I take another landlord who, after the term expired, desired to resume his holding or portion of it for one of the purposes recognized by the Act. Instead of applying to the Court, as he could have done during the term, to authorize the resumption upon such terms as the Court might think fit, he would be obliged to do one of two things—either demand a higher rent, which he did not want, and

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then have a fair rent fixed, or by serving a notice to quit oblige the tenant for his own protection to have a fair rent fixed.

Section 3, sub-section 1, of the Act of 1896 was passed to correct these anomalies, and it does so in a very simple way, by providing that on the expiration of a statutory term—that is to say, either the first or any subsequent statutory term—the tenancy shall continue a present tenancy, subject to the same rent and conditions (including the statutory conditions) as during the statutory term, until the tenancy is determined, or a new statutory term for the holding begins. The effect of this is to give both landlord and tenant the same advantages as they had during the term, and to relieve each from the necessity of applying for a new term for the sake of securing such advantages. The tenant thus escapes from the trouble and expense to which he would be otherwise exposed of protecting his rights; and it would be singular if the same relief was not given to a landlord who desires to apply for an order of resumption. But on a ground, the ingenuity of which I admire, it has been held that in the circumstances of this case he is not benefited by the amendment; and that to be in a position to apply for an order of resumption he is obliged, as a preliminary to such application, to take the weary round of demanding a higher rent, which he does not want, and of incurring the useless trouble of having a fair rent fixed for a second term.

I shall now state the argument which leads to this curious conclusion. Section 5 of the Act of 1881 sets forth the purposes for which the landlord may apply for an order of resumption. This applies to every successive statutory term in a holding; but section 8, sub-section 3, enacts that during the first statutory term an application for resumption shall not be entertained, unless in circumstances which do not exist in the present case. Therefore, it is argued that to entitle the landlord to apply for an order to resume he must, as a condition precedent, have a second statutory term created. The answer to this is to be found in the amending provision of the Act of 1896, construing it according to the plain meaning of its language, and avoiding verbal subtleties. It begins by the words—"On the expiration of a statutory term the tenancy shall continue a present tenancy, subject to the same

rent and conditions (including the statutory conditions) as during the statutory term." If we are to give words their ordinary meaning, the basis of the provision is that the statutory term has expired; and, if this be so, how a special limitation on the power to order resumption, which is confined to the first statutory term, can exist thereafter passes my comprehension.

The section might have been differently drawn. It might have declared that the statutory term was to be deemed to continue until another such term was created. It has not done so; and if I might speculate on the reason for its having been given its present form, I should say that it was enacted for the benefit of both landlord and tenant, and that it assumed its present shape for the very purpose of removing a restriction on the right to apply for resumption which was expressly confined to the first statutory term. It is not and cannot be denied that the landlord after much unnecessary expenditure can place himself in the position to make the application which has been dismissed on a technicality which certainly does not arise from the necessary construction of the section. It will be admitted that this is an unsatisfactory result.

CHERRY, L.J.:—

I agree with the judgment of the Lord Chancellor that the orders of the sub-commission and of the Judicial Commissioner should be affirmed.

The various provisions of the Irish Land Acts as to a landlord's right of resumption are to be found scattered through the Acts in a very perplexing manner. Here we are concerned only with the right of resumption, for the purpose of building, of a holding which, I assume for the purposes of my judgment, has always been held under a tenancy from year to year. We need not therefore consider the provisions of the Act of 1887, but may confine our attention to those of the Acts of 1881 and 1896.

The holding, which the landlord now seeks to resume, consists of 21 acres held at a rent of £45. The rent is a judicial one, having been fixed by an order of the Irish Land Commission, dated the 20th September, 1883. The first statutory term created by that order expired some time in the year 1898, and no second statutory term has been created.

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A statutory term may be created in three ways:—(1) Where the landlord demands an increase of rent from a tenant which a tenant agrees to pay, under section 4 of the Act of 1881; (2) where a judicial rent is fixed by the Court under section 8, sub-section 3, of the same Act; and (3) where an agreement and declaration fixing the rent are filed in Court in the prescribed manner under sub-section 6 of the same section. The incidents of the first statutory term vary, as regards the right of resumption, according to the manner in which the statutory term has been created. If it has been created by the demand and acceptance of a higher rent, the right is entirely regulated by section 5 of the Act of 1881. If it is created, in the usual way, by an order of the Court, the right of resumption, still regulated in general terms by section 5, is considerably curtailed by section 8. The rights of the parties must be determined by reading the 5th and 8th sections together; and a landlord, in order to succeed in an application for resumption, must prove, to the satisfaction of the Court, the conditions that are laid down in both sections. Where the statutory term arises from an agreement and declaration filed in Court, the conditions are apparently the same as when the rent is actully fixed by the Court, *i.e.*, the right of resumption is regulated by the 5th as modified by the 8th section of the Act of 1881.

This variation in the conditions exists only during the first statutory term. All subsequent statutory terms are uniform as regards this right of resumption. The conditions laid down in the 5th section alone apply, and the modification introduced by section 8 disappears.

Under the Act of 1881, the Court had no jurisdiction to order the resumption of a holding, except during the currency of a statutory term, or upon the expiration of a lease. Upon the expiration of a statutory term, the landlord might serve a notice to quit either for the whole holding under the Common Law, or for part of it under the Notice to Quit Act, 1876 (section 3), but he could not apply to the Court for resumption. This right he acquires by the Act of 1896. The 3rd section of that Act, which we have now to interpret and apply, provides that "on the expiration of a statutory term in a present tenancy, the tenancy shall continue a present tenancy subject to the same rent and

conditions (including the statutory conditions) as during the statutory term, until the tenancy is determined or a new statutory term for the holding begins."

The effect of this section is, in my opinion, very much the same as that of the 5th section of the Act of 1860 with regard to a tenant over-holding on the expiration of a lease. The statutory term is not prolonged no more than the lease in the latter case is prolonged; but the rights of the parties are the same, in every respect, as if it were prolonged. To ascertain the nature and extent of these rights, you must look to the rights during the *preceding*, not the *succeeding* statutory term. The fallacy of Mr. Chaytor's argument for the landlord appears to me to be this, that he assumes that because the first statutory term has expired, his clients have the same right of resumption as if a second statutory term had begun. But they would have no right of resumption at all but for the section, and the section merely prolongs their preceding rights. It provides that "on the expiration of *a* statutory term" the tenancy shall continue subject to the same conditions "as during *the* statutory term." The antithesis of the articles "a" and "the" plainly shows that it is the conditions of the expired statutory term, and not the conditions of a statutory term generally, which apply.

Again, it is argued that the "modification," as it is called, in section 8 of the Act of 1881, of the landlord's right of resumption is not a condition of the statutory term, but merely a time limit on its exercise under section 5. To this I think there are several answers. In the first place, I think that even if it were a mere time limit, it would be a "condition" of the statutory term. But it clearly is not merely a time limit. It affirmatively allows resumption in certain cases, while prohibiting it in others. It does not even mention a period of time at all. It provides that "during the statutory term in a tenancy *consequent on the first determination of a judicial rent* of that tenancy by the Court," the modification is to apply. The normal period of a statutory term is fifteen years; but that period may be now abridged under the 17th section of the Act of 1896, and a second statutory term may be created by agreement before the expiration of the fifteen years. If that were done, the rights of the

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parties would of course be altered, so that the modification does not apply for any definite period of time. It applies during the continuance of the statutory term, be it long or short, and now under the Act of 1896, after its expiration, until a new statutory term is created.

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How can the landlord contend that the 3rd section of the Act of 1896 gives him the benefit of section 5 of the Act of 1881, without the modification contained in section 8? The clause of section 5 dealing with resumption itself refers to sect. 8. "During the continuance of a statutory term in a tenancy, *save as hereinafter provided*" (*i.e.* by section 8), "the Court may" authorize resumption, &c. The two sections obviously must be read together; and if one applies, the other must apply too.

It is said that this is a mere matter of procedure, and that we should not put the landlord to the inconvenience of having a second-term rent fixed, when he is satisfied with the present rent, as a condition precedent to the exercise by him of his right of resumption. We cannot assume that the second-term rent would be the same as the present rent. It might be reduced; and the landlord's agent, Mr. Stewart, has given evidence that in his opinion it would be reduced 10 or 12 per cent. How such reduction would affect the tenant's claim for compensation on resumption, I do not know; but I think it would necessarily have some effect upon it. We cannot assume that the position of the parties would be the same if a second-term rent were fixed as it now is, and I cannot therefore regard the fixing of a second judicial rent as a mere step in the procedure for resumption. The new rent would be the rent of the farm whether the landlords succeeded in their application or not; and the landlords might very well hesitate to incur the risk of a reduction of rent for the doubtful chance of afterwards succeeding in an application for resumption.

It is not suggested, in the evidence or in argument, that the conditions of resumption laid down by section 8 (3) of the Act of 1881 are fulfilled in this case, and therefore I am of opinion that the order of the Judicial Commissioner was right, and should be affirmed.

Solicitors for the landlords: *Montgomery and Chaytor.*

Solicitors for the tenant: *D. and T. Fitzgerald.*

W. G.

EX PARTE THE STRABANE (No. 1) RURAL DISTRICT COUNCIL; IN THE MATTER OF THE LABOURERS (IRELAND) ACTS, 1883 TO 1906; THE STRABANE (No. 1) RURAL DISTRICT LABOURERS ORDER, 1908; AND IN THE MATTER OF £119 COMPENSATION AWARDED BY AN AWARD DATED 20TH FEBRUARY, 1909.

Ross, J. (for the *Master of the Rolls*). 1910. March 21.

Compulsory Purchase—Acquisition of land under Labourers Acts—Compensation—Jurisdiction of Local Government Board—Arbitrator—Mortgage—Instalment mortgage—Irish Land Commission—Payment into Court—Labourers (Ireland) Act, 1906, *s.* 11—*Housing of the Working Classes Act*, 1890, *Schedule II.*, *Articles* (9), (11)—*Lands Clauses Consolidation Act*, 1845, *ss.* 108, 112, 115–118.

Where a portion of land subject to a mortgage is taken under the provisions of the Labourers (Ireland) Act, 1906, the value of the part that is taken is to be assessed, and the sum so awarded is to be paid over to the mortgagee in satisfaction of his mortgage debt so far as the same shall extend.

Where the arbitrator purports to award a small portion only of the compensation moneys to the mortgagee, his award is in this respect bad, even though the mortgagee had notice of the arbitration proceedings, and took no steps to oppose the award or to set it aside.

An instalment mortgage to the Commissioners of Church Temporalities in Ireland does not differ from any other mortgage in this respect.

SUMMONS for payment of money lodged in Court under the Labourers (Ireland) Act, 1906.

The applicant, Joseph Gallagher, was the owner in fee-simple of a farm of land situated at Urney, in the barony of Strabane, and county of Tyrone. The said lands had been granted by the Commissioners of Church Temporalities in Ireland to Denis Shearin, the predecessor in title of the said Joseph Gallagher, in fee-simple by a deed poll, dated the 4th December, 1875. By an instalment mortgage of the same date the said Denis Shearin mortgaged the said lands to the said Commissioners, to secure the repayment of £269 8*s.* 2*d.* by half-yearly instalments. All the interest of the said Denis Shearin was now vested in the said

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Joseph Gallagher. Pursuant to the Strabane No. 1 Rural District Labourers Order, a portion of the said lands, containing 1A. 3R. 13P., was taken to provide sites for labourers' cottages, and an arbitrator was duly appointed to assess compensation. The said arbitrator sat to assess compensation, and notice of the arbitration was in the ordinary course served on the Irish Land Commission, as being some of the persons interested in the said lands. The arbitrator issued his award on the 20th February, 1909, whereby he awarded £119 as compensation for the said lands so acquired, and directed that the sum of £1 was to be paid to the Irish Land Commission on account of the instalments due out of the lands so acquired, the balance of the said sum to be paid to the said Joseph Gallagher, the applicant. The applicant's solicitor thereupon prepared and furnished an abstract of title to the Rural District Council, and the solicitor to the Rural District Council furnished him with a draft conveyance for his approval, but the Irish Land Commission refused to join in the conveyance unless a sum of £25 was paid to them on foot of their interest under the said instalment mortgage, instead of the sum of £1 awarded by the arbitrator. The applicant being, therefore, unable to make title, the Rural District Council refused to pay him any portion of the compensation moneys, whereupon the applicant issued a writ for the amount of the said compensation moneys on the 28th September, 1909. The Council entered an appearance to said writ, and subsequently filed a defence on the 27th October, 1909, on which day they also paid the whole amount of the compensation moneys awarded by the arbitrator into Court.

The applicant thereupon served notice of discontinuance of the action upon the Rural District Council, and took out the present summons to have the sum of £118, or such other sum as the Court should think fit, paid to him out of the moneys so lodged in Court, and to have the respective rights of the Irish Land Commission and the applicant in and to the said moneys determined.

Wylie, for the applicant :—

The Land Commission refuse to join unless they get £25, though the arbitrator has awarded them only £1. The arbitrator made his award. The Land Commissioners were notice parties

and took no steps. The award is final. I rely upon the Labourers (Ireland) Act, 1906, s. 11; Articles 9 and 11 of the second schedule to the Housing of the Working Classes Act, 1890; and Lands Clauses Consolidation Act, 1845, s. 112. Compensation for severance does not go to the mortgagee.

An instalment mortgage is different from an ordinary mortgage; the whole amount is not necessarily due on default of payment of an instalment. It has a redemption value which is totally different from its face value. It may be an "incumbrance" within the meaning of the Lands Clauses Acts without being a mortgage as defined by these Acts.

Leech, K.C., for the Irish Land Commission:—

The Land Commission are entitled to take the whole of the compensation money if they so desire: Lands Clauses Consolidation Act, 1845, sections 108, 112. The mortgagee is entitled to every part of his security. Article 11 of the second schedule to the Housing of the Working Classes Act, 1890, gives only the same powers as are contained in sections 115–118 of the Lands Clauses Consolidation Act, 1845. The arbitrator has no power to apportion a mortgage. He is only given power over incumbrances other than mortgages.

Maxwell, for the Strabane (No. 1) R. D. C.:—

The controversy between the applicant and the Land Commission is adverse litigation, and the necessity for lodging the money in Court arose by reason of it. The Council ought not to be obliged to pay any costs of lodgment or payment out.

Wylie, in reply.

Ross, J.:—

As regards the point under Article 9 of the second schedule to the Housing of the Working Classes Act, 1890, that the Land Commission were served with notice of the arbitration proceedings, but took no steps to oppose the award or to set it aside, I think the decision of the arbitrator is binding only if the matters are within his jurisdiction.

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In this case the arbitrator acted in excess of his jurisdiction. He had no power whatever to award the money he fixed as the value of this property to anybody except the mortgagee, that is the Irish Land Commission. The rights of the parties are regulated by section 112 of the Lands Clauses Consolidation Act, 1845. The value of the part that is taken is to be assessed, and the sum awarded is to be paid over to the mortgagee in satisfaction of his mortgage debt, so far as the same shall extend. The arbitrator had no power whatever by his award, contrary to the express words of the sections in the Act of Parliament, to determine that the money should go in a different way. When he has acted in this way, the Court ought to hold his award to be, in this respect, bad. The Land Commission are entitled to take the whole of the compensation money, so that they can do whatever they like in the matter.

As regards Mr. Wylie's contention that this is a kind of mortgage different from any other mortgage, I hold that the effect of this document is to create the relation of mortgagor and mortgagee, notwithstanding that the money is to be paid by instalments. This is a mortgage like any other mortgage ; in case default is made, the entire principal is recoverable, not merely the arrears of the instalments. I give the Land Commission a measured sum for costs, and I give such costs against the District Council as would have been incurred had an application been made to draw out money that was properly lodged in Court, but no costs incurred by reason of this contest with the Land Commission.

Solicitor for the applicant : *W. P. Moody.*

Solicitor for the Irish Land Commission : *William Alexander.*

Solicitors for the Strabane (No. 1) District Council : *Wilson & Simms.*

A. C.

IN THE MATTER OF THE ESTATE OF SIR J. A. R. GORE BOOTH.

Wylie, J.
1909.
Mar. 3, 10.

Tenant for life—Recoupment—Instalments—Purchase-money of perpetuity rents secured by mortgage of the rents and repayable by instalment annuities—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 26.

By grants under the Irish Church Temporalities Acts certain lands were conveyed to R., subject to perpetuity rents. In 1873 the said rents were purchased by R. Portion of the purchase-money was secured by mortgage, whereby the said rents were conveyed to the Church Commissioners, subject to the proviso that, if R. should pay to the Commissioners the principal sum thereby secured, with interest, by sixty-four half-yearly instalments, the Commissioners would reconvey the said rents as R. should direct, and the said mortgage contained a covenant by R. for payment of said principal sum by the instalments aforesaid, and empowered the Commissioners, in default of payment, to sell said rents. Under the will of R., made prior to 1873, H. became entitled to said rents for his life, with power of disposal of same by deed, and, on his death, J. became entitled thereto for his life under deed of appointment made pursuant to said power. Portion of the lands out of which said rents were payable having been sold under the Land Purchase Acts, the executors of H. and J., respectively, claimed to be recouped out of the redemption price of the apportioned parts of said rents redeemed in the matter, so much of the annual instalments paid by H. and J., respectively, as represented capital.

Held, that inasmuch as the principal sum secured by said mortgage was, prior to the execution thereof, a debt of R., and, notwithstanding the special arrangement as to the mode of repayment, remained by the terms of said mortgage, both in case of default and by the covenant for repayment, a debt payable out of the entire fee, the executors of H. and J., respectively, were entitled to be so recouped.

In re Nepean's Settled Estate ([1900] 1 Ir. R. 298), and *In re Moffett* (39 Ch. D. 534), followed and applied. *In re the Duke of Leinster's Settled Estate* (23 L. R. Ir. 152), and *In re Gunning Moore's Estate* (40 I. L. T. R. 224), distinguished.

Semble, the relative rights of tenant for life and remainderman are outside the scope and purpose of s. 26 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47).

Wylie, J. 1909.

In re Gore Booth's Estate.

Hearing of objection to Final Schedule of incumbrances. The facts as stated in the judgment of Wylie, J., were as follows :—

By a grant in perpetuity under the Church Temporalities Acts, dated 18th August, 1839, the lands of Ballygilgan were conveyed by the Bishop of Elphin to Sir Robert Gore Booth, subject to a perpetuity rent of £150 8*s.* 1½*d.*, and by another grant in perpetuity, under the same Acts, dated 29th October, 1873, the lands of Finned were also granted to Sir Robert Gore Booth, subject to a perpetuity rent of £33 8*s.* 5*d.* By a conveyance, dated 25th May, 1875, the Church Commissioners, in consideration of a sum of £1156 4*s.* 1*d.*, then paid by Sir Robert Gore Booth, and of a further sum of £3439 9*s.* 5*d.*, to be secured as therein provided, granted the said two perpetuity rents to Henry William Gore Booth, and his heirs, in trust for said Sir Robert Gore Booth, his heirs and assigns, absolutely; and by another deed of even date the said perpetuity rents were conveyed to the Church Commissioners, their successors and assigns, subject to the proviso that if the said Sir Robert Gore Booth, his heirs, executors, or administrators, should pay to the Commissioners, their successors and assigns, the said principal sum of £3439 9*s.* 5*d.*, with interest at the rate of 4 per cent. per annum, by sixty-four half-yearly instalments of £95 15*s.* each, from the 1st April, 1875, the Commissioners would reconvey the said perpetuity rents as the said Sir Robert Gore Booth should direct. The said deed contained a covenant by Sir Robert Gore Booth, for himself, his heirs, executors, and administrators, for payment of the said sum by the instalments aforesaid, and empowered the Commissioners, in case of default of payment, in the prescribed manner, to sell the perpetuity rents and pay out of the proceeds of sale all costs and expenses, and retain said principal money and interest then due on account of the money thereby secured.

By his will dated the 17th December, 1870, Sir Robert Gore Booth devised his unsettled estates and freehold property, which, at the time of his death, included the said perpetuity rents, to Henry William Gore Booth for the term of his natural life, with power, if he should think fit, by deed to dispose of the same absolutely by sale, lease, or otherwise, and from and after his

decease, in case he should make no such disposition, with remainder to his first and other sons in tail male, in such shares and proportions and with such limitations and restrictions as he should by deed or will appoint; and, in default of male issue, remainder over to testator's daughters. Sir Robert Gore Booth died on the 21st December, 1876, and thereupon Sir Henry William Gore Booth, succeeded him as tenant for life of said rents under said will of his father, and also became tenant for life of the lands out of which the said rents were payable, under the will of Robert Newcomen Gore Booth, dated the 18th February, 1861.

By deed, dated the 1st April, 1892, Sir Henry William Gore Booth appointed that the unsettled estates devised to him by his father's will should enure, from and after his death, to the use of the trustees therein named for a term of a thousand years, and, subject thereto, to the use of the vendor for life with remainder over.

Sir Henry William Gore Booth died on the 13th January, 1900, whereupon the vendor became tenant for life of said perpetuity rents under said deed of the 1st April, 1892, and also became tenant for life of the lands out of which the said rents issued under a re-settlement dated the 13th March, 1894.

Sir Henry William Gore Booth, as tenant for life of said rents, paid the instalments under said deed of the 25th May, 1875, from the 17th December, 1876, down to the 13th January, 1900; and since said last-mentioned date the vendor as tenant for life had also paid some of said instalments. The executors of Sir Henry William Gore Booth, and the vendor, respectively, claimed to be entitled to be recouped, out of the redemption price of apportioned parts of said rents redeemed in this matter, so much of said annual instalments paid by them respectively as represented capital.

The following ruling had been made by the Examiner:—

"The redemption price of these rents is also subject to the repayment thereout of the amount of the instalments paid by the vendor on foot of the mortgage to the Church Commissioners, dated the 25th May, 1875. I do not think that any of the instalments paid by Sir Henry William Gore Booth are now repayable to his

Wylie, J. 1909. *In re* GORE BOOTH'S ESTATE.

executors. Though he was tenant for life of these rents and, therefore, the ordinary presumption would seem to arise that such capital sums paid by him were living charges at the date of his death and vested in him, yet, as he had the power to become the absolute owner of the rents under the provisions of the will of Sir Robert Gore Booth, I think such presumption is rebutted. He did, by appointment in 1892, in fact treat these rents as his own property by settling them; and I think it would be held that his appointees were intended to take the rents discharged from any capital sums paid by the appointor during his lifetime": see *In re Lloyd's Estate* (1). "If the executors of Sir Henry William Gore Booth desire to make any claim, they will have to do so by objection to the Final Schedule" (2).

Pursuant to his said ruling, the Examiner had placed the vendor on the Final Schedule as a claimant in respect of so much of said instalments as had been paid by him as represented capital. The executors of Sir Henry William Gore Booth thereupon filed an objection claiming to be placed on the Final Schedule in respect of a like amount of said instalments paid by Sir Henry William Gore Booth during his lifetime. On the hearing of the objection, the question as to the right of the vendor to be placed on the Final Schedule as a claimant at all, in respect of such instalments, was raised by the trustees.

S. L. Brown, K.C., for the executors of Sir Henry William Gore Booth and for the vendor:—

This case is distinguishable from *In re Gunning-Moore's Estate* (3). There a claim was made for recoupment out of

(1) [1903] 1 I. R. 144.

(2) On the hearing of the objection it was submitted that, on the true construction of the will of Sir Robert Gore Booth, Sir Henry William Gore Booth took an absolute interest in the rents, and *Reid* v. *Atkinson* (5 I. R. Eq. 373) was cited, but Wylie, J., intimated that, in his opinion, Sir Henry William Gore Booth only took a life estate, and the arguments proceeded altogether on the question as to the right of the successive tenants for life to be recouped, the view taken by the Examiner on the point being affirmed. [REP.]

(3) 40 I. L. T. R. 224.

purchase-money for payments made in respect of fixed annual instalments in lieu of tithe rentcharge. There were two reasons why the tenant for life could not get recoupment—(1) The concluding portion of section 7 of the Irish Church Amendment Act, 1872 (35 & 36 Vict. c. 90), makes the same person liable to pay the instalments. No personal debt was created, but merely a charge for fifty-two years; and (2) the instalments were, in no way, a charge on the inheritance. The broad principle is laid down by the Vice-Chancellor in *In re Duke of Leinster's Settled Estate* (1). It is this, that where the charge is on the whole inheritance, although it is repayable by instalments, the tenant for life is entitled to be recouped in respect of payments made on foot of the charge; but, on the other hand, if it is a terminable charge, the tenant for life is bound to pay what falls due while he is in possession, and the principle of apportionment does not apply. *In re Nepean's Settled Estate* (2) was a case of an ordinary legal mortgage, and there was a contract between the parties that the loan should be repayable by instalments. The tenant for life was declared entitled to be recouped for instalments of capital paid by him. The decision is applicable to the present case, where there is a contract between the parties under the provisions of the Act which enabled them so to contract. If an absolute owner wishes to arrange that a charge shall be payable by successive tenants for life, he must avoid making it a charge on the inheritance. In the case of charges under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), it was expressly provided that the tenant for life was to be liable for payment of instalments. That was the ground of the decision in *In re Knatchbull's Settled Estate* (3). Section 66 of that Act is, however, practically repealed by the provisions of the Settled Land Acts which enable trustees to pay off charges of that kind out of capital moneys.

In re Harrison (4) is an authority for the general proposition that, where a tenant for life pays an annuity charged on the inheritance, he is entitled to a charge on the corpus of the estate

(1) 23 L. R. Ir. 152. (2) [1900] 1 Ir. R. 298. (3) 29 Ch. D. 588.
(4) 43 Ch. D. 55.

Wylie, J. 1909.

In re GORE BOOTH'S ESTATE.

in respect of each payment: see also *In re Perkins* (1), and *In re Dawson* (2).

W. M. Jellett, K.C., for the trustees of the deed of 1892 and the settlement of 1894:—

It is right to bear in mind that Sir Henry William Gore Booth took as a volunteer under the will of Sir Robert Gore Booth, who was bound to keep down the instalments. The rent here, as the tithe rentcharge in *In re The Duke of Leinster's Settled Estate* (3), was originally a charge upon the inheritance. There the Vice-Chancellor held that the substituted instalments were not a charge upon the inheritance. Accordingly, it follows that the instalments substituted here for the rent are not a charge upon the inheritance. Further, section 7 of the Irish Church Amendment Act, 1872 (35 & 36 Vict. c. 90), is merely a collection section. In effect it provides that you are entitled to get payment from somebody, but it does not purport to alter the equities as between tenant for life and remainderman.

S. L. Brown, K.C., in reply:—

Sir Robert Gore Booth was absolute owner. He could have provided by his will that Sir Henry William Gore Booth should be liable for the instalments. He did not do so. In the event of the non-payment of an instalment, under the contract between the parties, the entire amount was to become due. I rely on the distinction between instalments charged for a number of years and a capital sum charged on the inheritance and repayable by instalments spread over a number of years. Tithe rentcharge composition is only a charge of a fixed sum in each year for so many years. It is not a charge on the inheritance. The fact that principal and interest are combined in the instalment does not affect the question.

March 10.

WYLIE, J.:—

[After stating the facts as above set out His Lordship continued]—The question I have to decide is, whether the claim of

(1) [1907] 2 Ch. 596. (2) [1906] 2 Ch. 211. (3) 23 L. R. Ir. 152.

the executors of Sir Henry William Gore Booth and the vendor, respectively, to be recouped, out of the redemption-price of the apportioned parts of the perpetuity rents redeemed in this matter, so much of the annual instalments paid by Sir Henry William Gore Booth and the vendor, respectively, as represented capital, is sustainable?

Now there are two classes of cases in which the law is perfectly plain—first, where an owner in fee-simple, subject to a terminable annuity or rentcharge, such as a jointure, which the owner is under no personal obligation to pay, devises the land to one for life, remainder to another in fee, and the tenant for life, while in possession, year by year pays the jointure, it is, I think, well settled that he will have no claim for recoupment out of the estate against the remainderman, and this is so, even though the jointure is a charge on the fee.

In a very recent case, *In re The Duke of Manchester's Settlement* (1), where the settled estates had been sold in Court, and the residue of purchase-money paid to the trustees of the settlement, without prejudice to the claim of the jointress for unpaid arrears, and, on a summons by the trustees, raising the question as to whether they ought to apply a sum of capital moneys in their hands in paying the arrears of jointure, Eve, J., held that the *arrears* were "an incumbrance affecting the inheritance," and that the trustees should pay them out of the capital moneys, without prejudice to the question as to how, and by whom, and out of what fund such arrears ought ultimately to be borne; but there was no suggestion that the tenant for life would, on payment of the jointure, be entitled to any recoupment.

In *In re The Duke of Leinster's Settled Estate* (2), where the settled estate was subject to a charge for tithe rentcharge which, by an order under section 7 of the Irish Church Amendment Act, 1872, was merged in the land, and the purchase-money was declared to be payable by fifty-two annual instalments charged upon the land, and where the Duke, as tenant for life, in order to carry through a sale under the Land Purchase Acts, redeemed the unpaid annual instalments out of his own moneys, and claimed

(1) Weekly Notes, Nov. 6, 1909. (2) 23 L. R Ir. 152.

Wylie, J. 1909.

In re Gore Booth's Estate.

to be recouped the amount paid by him out of the purchase-money, the Vice-Chancellor decided that he was only entitled to be recouped on the basis that he was to be debited with the full amount of each annual instalment during his life. In this case there was not even a claim for recoupment in respect of past payments of instalments. The same question came before me in the case of *In re Gunning-Moore's Estate* (1), where I disallowed a claim for recoupment in respect of past payments of instalments, following, I have no doubt, the above decision of the Vice-Chancellor, though the case is not referred to in the report.

The second class of cases in which the law is also plain, is where a tenant for life pays off ordinary mortgage debts or other sums charged upon and payable out of the fee. In such cases the tenant for life is clearly entitled to stand in the shoes of the incumbrancer, and claim against the estate, unless there is clear evidence of an intention to make the payment for the benefit of the estate : See *Connolly* v. *Barton* (2), and *In re Wallace's Estate* (3).

There is another class of cases, such as *In re Harrison* (4) ; *In re Dawson* (5) ; *In re Henry* (6) ; and *In re Perkins* (7) : where a testator, having covenanted to pay a terminable annuity, settled by his will his fee-simple lands, either by specific devise or as part of his residuary estate, and the annuity became a charge upon the lands as a debt of the testator, it was held that the annuity must be treated as a debt payable out of the whole estate, and that the tenant for life and the remainderman must contribute towards its payment according to the value of their respective interests, though, in each of the cases mentioned, the same method of apportionment of the charge was not applied. It is clear, however, that in such cases the tenant for life is not bound to pay the entire annuity, but only a proportion according to his interest in the lands.

There is yet another class of cases represented by *In re Moffett* (8). In that case freeholds were granted to trustees to

(1) 40 I. L. T. R. 224.
(2) [1904] 1 I. R. 130.
(3) [1907] 1 I. R. 95.
(4) 43 Ch. D. 55.
(5) [1906] 2 Ch. 211.
(6) [1907] 1 Ch. 30
(7) [1907] 2 Ch. 596.
(8) 39 Ch. D. 534.

the use that the grantor and his wife should, during their joint lives and the life of the survivor, receive thereout an annuity or yearly rentcharge, and subject thereto to the use of M. in fee, and M. entered into a covenant with the grantor and his wife for payment of the annuity. It was held by Chitty, J., that, as between the tenants for life and remainderman, under the will of M., the annuity must be capitalized, and the burden borne in proportion to the value of their respective interests, there being nothing in the will to show an intention to the contrary. The short ground of the decision was this, that the substance and not the form of the transaction must be looked at, that the facts showed that the annuity was in reality the purchase-money of the lands which the testator covenanted to pay, that the annuity was, therefore, a debt and not a rentcharge only, and that its payment should be cast upon capital, but so that the burden should be proportionally adjusted between the tenant for life and remainderman.

The only other case to which I wish to refer is *In re Nepean's Settled Estate* (1). In that case a testator devised certain lands, subject to an instalment mortgage, to his wife for life, remainder to his children for life, remainder over. After testator's death the widow paid several instalments on foot of the mortgage. She died intestate, and further instalments were then paid by other tenants for life. The lands having been sold under the Settled Land Acts, and the balance of the mortgage paid off out of the proceeds, the Vice-Chancellor declared the tenants for life entitled to be recouped the sums paid by them on foot of the principal sum secured by the mortgage, but without any priority *inter se*. The provisions of the mortgage deed in that case are very shortly set out in the report. The covenant by the testator for repayment is not given, nor is the form of the proviso for repayment of the principal sum by instalments, but it is clear from the report that there was nothing in the nature of an annual charge for repayment of both principal and interest in a fixed number of years.

Now, I think I have almost exhausted the classes of cases in

(1) [1900] 1 I. R. 296.

Wylie, J. 1909.

In re GORE BOOTH'S ESTATE.

in respect of each payment: see also *In re Perkins* (1), and *In re Dawson* (2).

W. M. Jellett, K.C., for the trustees of the deed of 1892 and the settlement of 1894:—

It is right to bear in mind that Sir Henry William Gore Booth took as a volunteer under the will of Sir Robert Gore Booth, who was bound to keep down the instalments. The rent here, as the tithe rentcharge in *In re The Duke of Leinster's Settled Estate* (3), was originally a charge upon the inheritance. There the Vice-Chancellor held that the substituted instalments were not a charge upon the inheritance. Accordingly, it follows that the instalments substituted here for the rent are not a charge upon the inheritance. Further, section 7 of the Irish Church Amendment Act, 1872 (35 & 36 Vict. c. 90), is merely a collection section. In effect it provides that you are entitled to get payment from somebody, but it does not purport to alter the equities as between tenant for life and remainderman.

S. L. Brown, K.C., in reply:—

Sir Robert Gore Booth was absolute owner. He could have provided by his will that Sir Henry William Gore Booth should be liable for the instalments. He did not do so. In the event of the non-payment of an instalment, under the contract between the parties, the entire amount was to become due. I rely on the distinction between instalments charged for a number of years and a capital sum charged on the inheritance and repayable by instalments spread over a number of years. Tithe rentcharge composition is only a charge of a fixed sum in each year for so many years. It is not a charge on the inheritance. The fact that principal and interest are combined in the instalment does not affect the question.

March 10.

WYLIE, J.:—

[After stating the facts as above set out His Lordship continued]—The question I have to decide is, whether the claim of

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the executors of Sir Henry William Gore Booth and the vendor, respectively, to be recouped, out of the redemption-price of the apportioned parts of the perpetuity rents redeemed in this matter, so much of the annual instalments paid by Sir Henry William Gore Booth and the vendor, respectively, as represented capital, is sustainable?

Now there are two classes of cases in which the law is perfectly plain—first, where an owner in fee-simple, subject to a terminable annuity or rentcharge, such as a jointure, which the owner is under no personal obligation to pay, devises the land to one for life, remainder to another in fee, and the tenant for life, while in possession, year by year pays the jointure, it is, I think, well settled that he will have no claim for recoupment out of the estate against the remainderman, and this is so, even though the jointure is a charge on the fee.

In a very recent case, *In re The Duke of Manchester's Settlement* (1), where the settled estates had been sold in Court, and the residue of purchase-money paid to the trustees of the settlement, without prejudice to the claim of the jointress for unpaid arrears, and, on a summons by the trustees, raising the question as to whether they ought to apply a sum of capital moneys in their hands in paying the arrears of jointure, Eve, J., held that the *arrears* were "an incumbrance affecting the inheritance," and that the trustees should pay them out of the capital moneys, without prejudice to the question as to how, and by whom, and out of what fund such arrears ought ultimately to be borne; but there was no suggestion that the tenant for life would, on payment of the jointure, be entitled to any recoupment.

In *In re The Duke of Leinster's Settled Estate* (2), where the settled estate was subject to a charge for tithe rentcharge which, by an order under section 7 of the Irish Church Amendment Act, 1872, was merged in the land, and the purchase-money was declared to be payable by fifty-two annual instalments charged upon the land, and where the Duke, as tenant for life, in order to carry through a sale under the Land Purchase Acts, redeemed the unpaid annual instalments out of his own moneys, and claimed

(1) Weekly Notes, Nov. 6, 1909. (2) 23 L. R Ir. 152.

Wylie, J. 1909.

In re Gore Booth's Estate.

the authority of these two cases, I hold that the tenants for life in this case are entitled to be recouped out of the redemption price of the perpetuity rents so much of the several instalments paid by them as represented capital.

There is just one other matter I wish to refer to, merely to show that I have not overlooked it. It appears from section 26 of the Land Law (Ireland) Act, 1896, that the instalments payable under these Church mortgages are treated as annuities, and the Land Commission are empowered to apply to them provisions of the Land Purchase Acts applicable to purchase annuities, and have applied those provisions in this case by reducing the interest and extending the period of payment: but, in my opinion, those provisions cannot affect the rights *inter se* of tenants for life and remaindermen. Though both are bound as between them and the Land Commission by the new mode of repayment fixed under the Act, and though this new mode of repayment may diminish the amount both of interest and principal payable by the tenant for life each year, it cannot, in my opinion, affect the right of the tenant for life to be recouped whatever portions of the capital he may pay off. I think the relative rights of tenant for life and remainderman are outside the scope and purpose of section 26: see *De Vesci* v. *O'Connell* (1).

Solicitor for the executors and the vendor: *Nathaniel Taylor.*
Solicitors for the trustees: *Thomas Crozier & Son.*

J. E. W.

also on payment of interest for said principal sum of £2900, or for so much thereof as should for the time being remain unpaid, on every 11th January and 11th July in each year. The mortgagor covenanted with the mortgagee to pay "the said principal sum of £2900 by instalments, with interest thereon as aforesaid, as before mentioned, until the whole of said principal sum shall be paid off and discharged, and shall also pay to the said Henry Pope, his executors, &c., interest for the said principal sum of £2900, or so much thereof as shall for the time being remain unpaid on the security of these presents, at the rate of £5 per cent. per annum, by half-yearly payments on the 11th January and 11th July in every year." [Ed.]

(1) [1908] A. C. 298.

LEDWITH *v.* ROSS.

Ross, J.
1910.
Feb. 21,
Mar. 1.

Landlord and tenant—Lease for life in being—Order fixing fair rent—Devolution of lessee's interest—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 21—*Ejectment—Costs—Plaintiff successful on issues of law, unsuccessful on issues of fact.*

A testator holding a farm of land under a lease to the lessee, his heirs and assigns, for three lives, one of which was in existence at his death, by his will devised the farm to his wife during widowhood, and made a residuary bequest of his personal property to the plaintiff and another jointly, and died intestate as to the residue of his real property. His widow, before the death of the last life in the lease, had a fair rent fixed under the Land Law (Ireland) Act, 1881. The last life in the lease died in the lifetime of the widow, who subsequently purchased the fee under the Land Acts.

Held, that the tenancy *pur autre vie*, notwithstanding the fixing of the fair rent, remained a tenancy *pur autre vie* for the purpose of devolution. *M'Evoy* v. *M'Evoy*, [1897] 2 I. R. 295, dissented from; *In re Ruttledge's Estate*, [1895] 1 I. R. 328, followed.

Held, further, that the tenancy from year to year arising on the determination of the tenancy *pur autre vie* was personal property of the testator, and passed to the plaintiff as survivor of the two residuary legatees in the will.

Plaintiff at the trial was successful as to the issues of law, but failed on the issues of fact.

Held, that each of the parties should bear his own costs.

Trial of Action.

Prior to the year 1866, Michael Ledwith became possessed of and entitled to the tenant's interest in that part of the lands of Sleehaun, containing 228 acres and 19 perches, in the county of Longford, held under a lease dated 6th May, 1839, and made between Richard Fox and John Fleming, whereby Richard Fox demised the said lands to John Fleming, his heirs and assigns, for a term of three lives or thirty-one years, from the 1st day of May, 1839, and in that other part of the said lands containing 79 acres, and held by the said Michael Ledwith as tenant from year to year.

Ross, J.
1910.

LEDWITH
v.
ROSS.

By his will dated 29th December, 1866, the said Michael Ledwith devised to his wife, Catherine Ledwith, his house and lands at Sleehaun, during widowhood, with a gift over to the testator's son, Patrick, in case his said wife should marry, or in the event of his said son surviving her, and the testator appointed his two elder sons, Patrick and Peter (the plaintiff), joint residuary legatees, and nominated his wife and two others executors of his will.

The testator being possessed of and entitled to the said lands, died on 7th September, 1869. Shortly after the death of the testator, his widow, Catherine Ledwith, who did not re-marry, entered into possession of the lands, with the assent of the executors, as tenant, under the devise to her contained in the said will, and continued in possession of the same up to the date of her death on 16th September, 1909.

Catherine Ledwith, as such tenant, by notice dated 31st October, 1887, applied to the Land Commission to fix a fair rent upon that portion of the said lands comprised in the said lease, viz., 228 acres and 19 perches, and by an order dated 22nd August, 1890, Catherine Ledwith was declared to be deemed a tenant of a present tenancy in the said portion of the said lands, and the fair rent thereof was duly fixed and determined.

By an agreement dated 1st May, 1908, and made between Captain William Waller Fox and Mrs. Fox of the one part, and the said Catherine Ledwith of the other part, the said Catherine Ledwith agreed to purchase that portion of the said lands containing 228 acres and 19 perches, pursuant to the provisions of the Irish Land Act, 1903.

Patrick Ledwith, the testator's eldest son, died intestate and unmarried on 8th June, 1894, leaving the plaintiff, the testator's second son, the surviving residuary legatee under the said will.

The said Catherine Ledwith, who was the surviving executor of the said Michael Ledwith, made her last will dated 7th March, 1901, whereby she bequeathed, subject to certain pecuniary bequests, all the residue of her property to the defendant, Mary Ross, and died on 16th September, 1909, and probate thereof was granted to the defendants Mary Ross and James Ross, the executors

named in the will. It appeared that the last life named in the lease, Fox to Fleming, died in 1904.

The plaintiff alleging that the defendant Mary Ross, and her husband, the defendant John Ross had entered into possession of all the said lands, and had refused to deliver up possession of the same to the plaintiff, and that the defendants Mary Ross and James Ross had refused to convey or assign to the plaintiff their estate or interest in the said lands, or the benefit of the said agreements, claimed—(*a*) to have it declared that the interest of the said Catherine Ledwith, as tenant of the said lands under the order of the 22nd August, 1890, and her interest therein upon the expiration of the statutory terms thereby created, and her interest in the said lands under the said agreements of 1st May, 1908, were respectively grafts upon her previous interest therein; (*b*) for a declaration that, in the events which had happened, the plaintiff was now entitled to all the tenant's estate and interest in the said lands, under the orders or agreements aforesaid, and to the full benefit of the said agreements, and that the defendants Mary Ross and James Ross held the same as trustees for the plaintiff, and that they be ordered to convey to the plaintiff all their estate and interest in the said lands; (*c*) possession of the said lands, and an account.

The defendants Mary Ross and James Ross, by their defence, submitted that two questions arose on the construction of the will of Michael Ledwith—(1) Whether Patrick Ledwith took an absolute vested interest in all the lands, subject only to the life estate of Catherine Ledwith therein; (2) if Patrick Ledwith did not take such an interest, did the said Patrick Ledwith become entitled as heir-at-law of Michael Ledwith to as much of the said lands as was held by Michael Ledwith at the time of his death under a freehold title, subject only to the life estate of Catherine Ledwith therein? Patrick Ledwith having died on 8th June, 1894, after the date of the order deeming Catherine Ledwith a tenant of a present tenancy, and fixing a fair rent on the leasehold premises, but the last life named in the said lease not having expired till 1904, the defendants submitted that the interest in the said lands was a chattel interest at the date of the death of Patrick Ledwith, and the defendants as executors of Catherine Ledwith,

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and personal representatives of Michael Ledwith, submitted to the jurisdiction of the Court. The defendant John Ross denied that he entered into or was in possession of the premises, and claimed no interest therein.

The plaintiff, by his reply, further pleaded that the matters in difference between the parties were in 1896 submitted to the arbitration of the Bishop of Ardagh, and that the parties were bound by the award of the Bishop deciding what the rights of the parties would be after the death of Catherine Ledwith, and that the defendants were by the said award estopped from questioning the plaintiff's right to the lands. The plaintiff further submitted that the freehold interest continued to subsist at law and in equity until the fall of the last life named in the lease, and was subsisting at the date of the death of Patrick Ledwith, and that upon Patrick Ledwith's death the plaintiff, as his heir, became entitled as special occupant to all his estate and interest therein at law and in equity.

H. Wilson, K.C. (with him *M'Cann, K.C.*, and *Overend*) for the plaintiff:—

When the testator, Michael Ledwith, died in 1869, he had—(1) The term of years expiring in 1870; (2) the estate *pur autre vie*, of which the last life did not die till 1904; (3) any possible extension of the term which might be granted by the landlord, or by statute. The defendants contend that by getting a fair rent fixed in 1890 the widow converted the freehold into a chattel interest for all purposes. It might be so converted as between landlord and tenant, but not so as to affect the devolution of title as regards third parties. In *M'Evoy* v. *M'Evoy* (1), the absolute owner converted his interest by getting a fair rent fixed. Here we have a limited owner. For devolution purposes you must take it that the lease continued till 1904. In 1904, irrespective of the fixing of a fair rent, it was a chattel interest, and passed under the residuary bequest in the will.

(1) [1897] 1 I. R. 295.

Denning (with him *Pigot, K.C.*) for the defendants James and Mary Ross :—

The fixing of a fair rent in respect of lands held under a lease for lives has the effect of converting the tenant's interest into a chattel interest: *M'Evoy* v. *M'Evoy* (1).

It is not the act of the parties, nor of the Court, but the effect of the statute, that operates to work a conversion: *Sturgess* v. *Ryan* (2); *Glenny* v. *Bell* (3).

M'Evoy v. *M'Evoy* (1) has never been overruled: *Irish Land Commission* v. *Magorian* (4), following *In re Ruttledge's Estate* (5). The lease is gone, and the mode of devolution changed, with the result that the personal representative of Patrick Ledwith takes the property as against his heir-at-law.

Pigot, K.C. :—

When the Court fixes a fair rent, it is not the Court which alters the nature of the tenancy; it is the Legislature through the Court. Similarly, under the Registration of Title Act, 1891, where a tenant for life buys and registers, the interest in the holding becomes altered, and devolves on the personal representative. The cases decide that the tenancy *pur autre vie* ceases, and that it becomes a tenancy from year to year: *Carrickfergus U. D. C.* v. *Martin* (6).

T. J. Smyth, for the defendant John Ross.

M'Cann, K.C., in reply :—

M'Evoy v. *M'Evoy* (1) is inconsistent with *Irish Land Commission* v. *Brown* (7), and must be treated as overruled.

The decision of Sir Andrew Porter in the former case is founded on an erroneous construction of the words "deemed to be." The meaning of those words has now been authoritatively explained and settled in the House of Lords: *De Vesci* v. *O'Connell* (8).

(1) [1897] 1 I. R. 295.
(2) 24 L. R. Ir. 305.
(3) [1898] 2 I. R. 233.
(4) [1901] 2 I. R. 445.
(5) [1895] 1 I. R. 328.
(6) [1906] 2 I. R. 79.
(7) [1904] 2 I. R. 200.
(8) 1908] A. C. 298.

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In the case of an estate *pur autre vie* the heir does not take by descent, but as a special occupant: *Chaplin* v. *Chaplin* (1). Here you have this estate *pur autre vie* limited to Catherine and then to Patrick as special occupant. How then could any act of Catherine take away the interest of plaintiff, who after the death of Patrick was the special occupant, *persona designata*? No change in the character of the property could interfere with the devolution after the testator's death: *More-Smyth* v. *Mountcashell* (2).

Ross, J., proceeded to deliver judgment on the questions of fact raised on the pleadings, and decided—(1) That as the destination of the farm was not in the minds of the parties, and was not submitted to the arbitration of the Bishop, the award on that point was not binding; (2) that the defendant John Ross had not entered into possession of the lands, and that the action must be dismissed as against him; but, as there was no necessity for him to appear by an independent solicitor, he gave the defendant John Ross no costs. His Lordship reserved judgment on the questions of law raised in the pleadings and arguments.

Mar. 1.

Ross, J.:—

Michael Ledwith held part of the lands of Sleehaun under a lease for a term of three lives or thirty-one years from 1st May, 1839. He also held another part of the lands of Sleehaun as tenant from year to year under the same landlord.

By his will made in 1866, of which I only give the material portions, he devised and bequeathed both divisions of the lands of Sleehaun to his wife Catherine for life. He appointed his sons Patrick and the plaintiff Peter residuary legatees.

The testator died on 7th September, 1869. His widow Catherine remained in possession till the date of her death, 16th September, 1909. The term of years in the lease expired on the 1st of May, 1870. The last life expired in the year 1904.

Catherine Ledwith had a fair rent fixed on the leased portion under the Land Act of 1887, the originating notice having been served on 31st October, 1887. Both portions were sold to her

(1) 3 P. Wms. 364. (2) [1895] 1 I. R. 44.

under the Purchase Acts in the year 1908. Patrick Ledwith, the testator's eldest son, died in 1894 intestate, and unmarried. Administration was in January, 1910, granted to plaintiff.

No question arises as to the portion not held under the lease. It is admitted that it passes under the bequest of the personalty in the will to the plaintiff, Peter Ledwith. I have already disposed of the questions of fact in the case. The only question remaining arises in respect of the lands comprised in the lease. To whom do they go in the events that have happened?

It is contended on behalf of the defendant that the freehold subject to his mother's life estate vested in Patrick Ledwith; that under the decision of *M'Evoy* v. *M'Evoy* (1) the freehold interest was turned into a chattel interest for all purposes by the fair rent proceedings, and must be divided among the next-of-kin of Patrick Ledwith. In my opinion, the decision in *In re Ruttledge's Estate* (2), founded on the reasons given, is wholly inconsistent with the decision in *M'Evoy* v. *M'Evoy* (1), founded on the reasons given. Both decisions are of high authority and have been approved of by eminent Judges.

In the argument in *M'Evoy* v. *M'Evoy* (1) the learned Judge's attention was not called to what, I think, is the true principle affecting the matter; and the cases illustrating the principle were not cited. The principle is, that when by statute something is deemed to be what it is not in fact, a Court is bound to ascertain for what purposes and between what persons the statutory fiction is to apply. The statute can only be operative within these limits, and cannot affect persons and interests outside the scope of the statute.

Turning to the case now in question, the devolution of the interest is in no way brought within the scope of the rent-fixing statute. Provided a rent is fixed, it is of no importance whether the interest goes to the heir or the personal representative. The matter in hand is the determination of the relationship of the landlord and the tenant. To apply this fiction to all persons and all interests is a dangerous doctrine, and should no longer be acted on in the case of estates administered in the Chancery

(1) [1897] 1 I. R. 295. (2) [1895] 1 I. R. 328.

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Division as at present. The cases that were reported but not cited in *M'Evoy* v. *M'Evoy* (1) are *Gover's Case* (2) in 1875, *Ex parte Walton* (3) in 1881, and *Hill* v. *East & West India Dock Co.* (4) in 1884.

Since the judgment in *M'Evoy* v. *M'Evoy* (1) the case of *De Vesci* v. *O'Connell* (5) has been decided by the House of Lords dealing with a similar fiction in a Land Purchase Act. The Lord Chancellor briefly sums up the effect of the case. "The words in question are to be construed to effect the purposes of the Act, and not to affect parties whom it was not the purpose of the Act to touch." There may be cases where the subject-matter is so affected by the statutory fiction that it is impossible to preserve the interests of outside parties, but in this case there is no difficulty to prevent the rightful devolution of the property.

It may be possible to support *M'Evoy* v. *M'Evoy* (1) on the special facts. The grantee was absolute owner, and when the interest was converted into a chattel interest, the heir-at-law may have had no equity for reconversion. But the decision was not based on this contention, and in the present case the person who got the rent fixed was not absolute owner, but only tenant for life. As the cases of *M'Evoy* v. *M'Evoy* (1) and *In re Ruttledge's Estate* (6) are conflicting decisions by Courts of co-ordinate jurisdiction, I am at liberty to follow the latter decision.

I have now to consider to whom the interest goes. There are three interests in the lease. First, the term of years: it expired in 1870, and is out of the case; second, there is the freehold interest, which is also gone by the cesser of the last life in 1904; thirdly, there is the present tenancy, which has arisen by reason of section 21 of the Land Act of 1881. This interest came into being during the existence of the wife's life estate by reason of the acceleration effected through the fixing of the fair rent. Now, this is a chattel interest, and must be treated as the personal property of the testator, Michael Ledwith. It is, in my opinion,

(1) [1897] 1 I. R. 295.
(2) 1 Ch. D. 182.
(3) 17 Ch. D. 746.
(4) 9 App. Cas. 448.
(5) [1908] A. C. 298.
(6) [1895] 1 I. R. 328.

caught by the bequest of the testator's personalty, and now belongs to the surviving son Peter, the plaintiff in this action.

I cannot adopt the alternative view presented by the plaintiff, that Patrick Ledwith took the estate as a special occupant, and that, not being a volunteer, there is an equity to have the personal estate converted into real estate. I am unable to entertain this view, inasmuch as the tenant for life was solely in occupation beyond the period during which the lives were in existence.

I accordingly declare the interest which Catherine Ledwith at her death had in the lands to be a graft. I declare the plaintiff entitled to the lands as surviving residuary legatee under the will of his father. I direct the defendants to convey to the plaintiff all their estate and interest in the lands and the benefit of the arrangements to purchase under the Land Acts.

On the question of costs—

Pigot, K.C.:—

This action was for the administration of the whole unadministered estate of Michael Ledwith. The defendants are entitled to their costs out of the estate.

The only questions of fact raised on the pleadings and fought out at the trial were the questions of the bishop's award and the question whether John Ross was liable as being in possession of the lands. Both those issues were decided against the plaintiff. If those issues had not been raised, the questions of law were such as could have been decided on an originating summons. Therefore the plaintiff is entitled only to such costs as he could have got on an originating summons, and he should be ordered to pay to the defendants such additional costs as defendants incurred other than defendant's costs of an originating summons: *Whitmore* v. *O'Reilly* (1).

H. Wilson, K.C., for the plaintiff, referred to *Connolly* v. *Leahy* (2), *per* Andrews, J., at p. 353.

(1) [1906] 2 I. R. 357. (2) [1899] 2 I. R. 344.

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Ross, J.:—

The question as to John Ross does not affect the defendants Mary and James Ross. The case of *Whitmore* v. *O'Reilly* (1) does not seem to assist me in any way. I see no reason why the plaintiff, who has been successful, should be made to pay the defendants' costs. I direct each of the parties to bear his own costs.

Solicitors for the plaintiff: *O'Connor & Dudley.*

Solicitor for the defendants Mary Ross and James Ross: *N. J. Downes.*

Solicitor for the defendant John Ross: *T. W. Delany.*

D. M. S.

(1) [1906] 2 I. R. 357.

IN THE MATTER OF THE ESTATE OF EMMA A. SHELTON.

Wylie, J.
1910.
Mar. 14, 21.

Marriage settlement—Covenant to settle after-acquired property—Bonus—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3.

Where settled lands are sold under the Land Purchase Acts, the bonus payable to the tenant for life pursuant to the provisions of s. 48 of the Irish Land Act, 1903, and s. 3 of the Irish Land Act, 1904, is not captured by a covenant in a marriage settlement, which in terms provides that if vendor then was, or if during coverture she or her husband, in her right, should become seised or possessed of, or entitled to, any real or personal property of a certain value for any estate or interest whatsoever, then the vendor and all necessary parties should convey, assign, and assure, the said real or personal property to the trustees upon the trusts therein declared.

Tremayne v. *Rashleigh* ([1908] 1 Ch. D. 681) not followed.

QUESTION ARISING ON ALLOCATION.

The facts as stated in the judgment of Wylie, J., were as follows:—By settlement dated the 27th March, 1882, and executed on the marriage of Deane Shelton with Emma A. Shelton, otherwise Atkinson, the vendor, certain property to which the latter was then entitled was assigned to the trustees of the settlement upon trust for the vendor for life, with remainders over. The trustees were authorized, at the request of the vendor, to realize said property and invest the proceeds in the purchase of freehold lands in Ireland, and, upon a like request, to sell the lands so purchased. By said settlement it was also agreed and declared that, "if the said Emma Anne Atkinson now is, or if during the said intended coverture she or the said Deane Shelton, in her right . . . , shall become seised or possessed of, or entitled to, any real or personal property of the value of £100 or upwards, for any estate or interest whatsoever . . . , then and in every such case he, the said Deane Shelton, and the said Emma A. Atkinson, and all other necessary parties, shall . . . convey, assign, and assure the said real or personal property to, or otherwise cause the same to be

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vested in, the said trustees or trustee," to be held upon the trusts declared of the said settled property. Part of said settled property was invested in the purchase of the lands sold in this matter, which were conveyed to the trustees on the 27th December, 1884. By order of Mr. Justice Barton, dated the 6th December, 1909, the vendor was given liberty to exercise the powers of sale conferred by section 63 of the Settled Land Act of 1882. The vendor, as tenant for life of the lands so purchased, or as the person deemed to be such tenant for life, had sold the said lands in this matter, and claimed to have the bonus paid to her for her own use and benefit.

R. H. Macrory, for the vendor:—

The only question is, whether the after-acquired property clause, having regard to its terms, captures the bonus? The bonus is an interest in the settled lands: see *In re Lady Annaly's Estate* (1); *In re Power's Estate* (2); see also *Tremayne* v. *Rashleigh* (3), where Eve, J., purported to follow the decisions already cited, but came to the opposite conclusion, although he agrees that the bonus is an interest in the lands. Anything coming to a person through the medium of the trusts of the settlement is not caught by the after-acquired property clause, unless there are express words to that effect. Every after-acquired property clause contains by implication the words "not hereinbefore settled" where the words are not expressly inserted. These words were not in the after-acquired property clause in *In re Clutterbuck's Settlement* (4); see also observations of Lord Macnaghten in *Mackenzie* v. *Allardes* (5). The vendor became entitled to the bonus for her own use when she agreed to sell, and got it through the medium of the settlement.

Garrett Walker, K.C., for the trustees of the settlement:—

The last two cases cited throw no light on this case, as they merely decide that accumulations of income are not captured by an after-acquired property clause. *Tremayne* v. *Rashleigh* (3) applies expressly. In *In re Lady Annaly's Estate* (1), and *In re*

(1) 53 W. R. 150.
(2) [1907] 1 Ir. R. 51.
(3) [1908] 1 Ch. D. 681.
(4) [1905] 1 Ch. 200.
(5) [1905] A. C., at pp. 292, 293.

Power's Estate (1), there were express words excluding the property settled. In this case there is a clear covenant to settle property to which the vendor then was, or during coverture should become entitled to. The provisions of the Irish Land Act of 1904, giving the bonus to the tenant for life absolutely, make it amenable to the covenant to settle after-acquired property.

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WYLIE, J.:— Mar. 21.

[After stating the facts as above set out, his Lordship continued]—I had occasion to decide almost the same question not long ago in *In re Power's Estate* (1). In that case I referred to the views expressed by Ross, J., in *In re Ely's Estate* (2), and by Kekewich, J., in *In re Annaly's Estate* (3), with reference to the nature and character of the bonus, and both the learned Judges appeared to agree in this, that the bonus was an interest in the lands sold, and was, apart from the Act of 1904, captured and bound by the trusts affecting the settled lands even where there was no covenant to settle existing or after-acquired property.

Now, if this be the correct view as to the nature of the bonus, let us see whether the covenant in this case can possibly apply to it? The covenant is that if the vendor now is, or if during . . . coverture she . . . shall become seised or possessed of, or entitled to, any real or personal property . . ., she . . . shall . . . convey, assign, and assure the said real or personal property to . . . the trustees, to be held upon the trusts declared of the settled property. Now that covenant embraces two classes of property, viz., property to which the covenantor was then entitled, and property after acquired; but that must mean, it seems to me, property other than the settled property. How can a covenantor, in fulfilment of the covenant, convey, assign, and assure to the trustees any property that she has already conveyed, assigned, and assured to them by the settlement. By the settlement of 1882, as already stated, the vendor assigned certain property, and all her estate and interest therein, to the trustees upon trust for vendor for life, with remainders over. The trustees, under a power in the settlement,

(1) [1907] 1 Ir. R. 51.
(2) [1904] 1 Ir. R. 66.
(3) 53 W. R. 150.

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realized part of the said property, and invested the proceeds in the purchase of the lands sold herein, and when these lands were conveyed to the trustees, the vendor became tenant for life of the lands, not by virtue of any new acquired title, but by virtue of her life interest in the funds under the settlement. Therefore, any interest she took in the lands when purchased could not be after-acquired property within the covenant. In the same way, it seems to me that her interest in the bonus was not after-acquired property, but became her own under the statute, by virtue of her original life interest under the settlement. In my opinion, therefore, the interest of the vendor in the bonus does not come within the covenant either as existing or after-acquired property, the bonus being, as decided in *Ely's Estate* (1), and *Annaly's Estate* (2), apart from the Act of 1904, an interest in the settled property, and subject to trusts affecting it.

I have not thought it necessary to refer in detail to the cases which seem to me to support the views I have just expressed as to the scope and effect of a covenant to settle existing and after-acquired property, but I may mention *Churchill* v. *Denny* (3); *Finlay* v. *Darling* (4); *In re Clutterbuck's Settlement* (5); and *MacKenzie* v. *Allardes* (6).

Now, referring again to my decision in *In re Power's Estate* (7), there is no doubt that the wording of the covenant in that case differed somewhat from the covenant here. There the words were, "All real and personal estate (if any) *not hereinbefore settled.*" But I do not think, for the reason I have stated, that the difference is material; and though I referred to and relied upon the additional words in that case in construing the covenant, it was not the final ground of my decision, which is there expressed in these words (8) —"The trustees of the settlement sell the Government Stock and invest the proceeds in land, and the tenant for life, first of the stock and then of the land, sells the land under the Land Purchase Acts, and gets for it what is technically called purchase-money, and also

(1) [1904] 1 Ir. R. 66.
(2) 53 W. R. 150.
(3) L. R. 20 Eq. 534.
(4) [1897] 1 Ch. D. 719.
(5) [1905] 1 Ch. D. 200.
(6) [1905] A. C. 285.
(7) [1907] 1 Ir. R. 51.
(8) *Ibid.*, at p. 55.

a percentage or bonus. It is the same title that gives her a right to both. She does not acquire a future title to the bonus, such as would leave it free from the trusts of the settlement, which bound her entire interest in the trust property at the date of the settlement, and make it subject to the covenant to settle after-acquired property. The view of Mr. Justice Ross, adopted and approved of by Mr. Justice Kekewich, was that the bonus, under section 48 of the Act of 1903, was subject to the trusts affecting the purchase-money. This view appears to me to have been also adopted by the Legislature, and embodied in section 2 of the Act of 1904, subject, however, to the exception expressly enacted by section 3 (1), that where the vendor is a tenant for life, the bonus shall be retained by him as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold, or the purchase-money thereof, and from any trust affecting the same." That was my view as expressed in *In re Power's Estate* (1), and, after the fullest consideration again, I see no reason to change it, notwithstanding the recent case of *Tremayne* v. *Rashleigh* (2), upon which counsel for the trustees rely. In that case Mrs. Tremayne conveyed to the trustees of a voluntary settlement all her estate and interest in the lands of Garracloon upon trust for herself for life, with remainders over, and by same deed covenanted that if the settlor "now is, or if at any time during her present coverture she shall become seised, possessed, or entitled of or to any real or personal property (other than the property hereby specifically settled) . . . then . . . all such real and personal estate . . . shall . . . be assured or transferred by" the settlor to the trustees upon the trusts affecting the settled lands. Mrs. Tremayne sold the above lands under the Land Purchase Acts, and the bonus was paid out to the trustees. Mrs. Tremayne then issued a summons before Mr. Justice Eve to have it determined whether she or the trustees were entitled to the bonus. Now, Eve, J., after referring to the three cases I have mentioned—*In re Ely's Estate* (3); *In re Annaly's Estate* (4), and *In re Power's Estate* (1), and adopting the view taken in all these cases as to the nature of

(1) [1907] 1 Ir. R. 51.
(2) [1908] 1 Ch. D. 681.
(3) [1904] 1 Ir. R. 66.
(4) 53 W. R. 150.

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the bonus, says (1): "Such being the nature of the bonus, it is impossible for me to treat it as an incident or by-product of the life estate. It is, in fact, according to these authorities, an interest in the settled hereditaments, and an interest to which the tenant for life, Mrs. Tremayne, became entitled, or which accrued to her, when the Act of 1903, interpreted by the Act of 1904, came into force"; and, as that date was during the coverture, Eve, J., held that the bonus was captured by the covenant, though the covenant was substantially in the same form as that in *In re Annaly's Estate* (2) and *In re Power's Estate* (3).

The only observation I wish to make upon that decision is this, that it appears to me to be entirely opposed to the decisions in *In re Annaly's Estate* (2) and *In re Power's Estate* (3), and the reason for the decision, so far as I can follow it, is I think, inconsistent with the principles laid down in *Churchill* v. *Denny* (4) and the other cases to which I have referred. But let me suppose that the view of Eve, J., is right, that the bonus is within the covenant to settle after-acquired property. What is the effect of that? Does it do more than make the bonus subject to the trusts affecting the settled land? I think not. That was the only object of the covenant. And if so, it seems to me that the Legislature, which conferred this bonus for the purpose of aiding sales and encouraging tenants for life in particular to sell, had full power to prescribe the persons to whom, and the conditions under which, it should be paid, and, having before them the decision in *In re Ely's Estate* (5), that the bonus under section 48 of the Act of 1903 was, when payable, subject to the trusts affecting the settled lands, the Legislature appears to me to have deliberately passed the Act of 1904 for the purpose of making their intention clear, that in cases where the vendor was a tenant for life, or a person having the powers of a tenant for life, he should be entitled to get the bonus for his own use and benefit, freed and discharged from the trusts affecting the settled lands. In my view, therefore, the decision in *Tremayne* v.

(1) [1908] 1 Ch. D., at p. 696.
(2) 53 W. R. 150.
(3) [1907] 1 Ir. R. 51.
(4) L. R. 20 Eq. 534.
(5) [1904] 1 Ir. R. 66.

Rashleigh (1) is not only contrary to the decisions in *In re Annaly's Estate* (2) and *In re Power's Estate* (3), but is directly opposed to the provisions of section 3 (1) of the Act of 1904.

These are the two grounds on which, as laid down by Sir George Jessel, M.R., in *Ebbs* v. *Boulnois* (4), "it is allowable for a Judge to decline to follow a recent decision of a Court of co-ordinate jurisdiction." I, therefore, in accordance with what I conceive to be the effect of the previous decisions and of the plain words of the Act of Parliament, decide that the vendor is entitled to the bonus.

Solicitor for the vendor: *T. T. L. Overend.*
Solicitor for the trustees: *M. A. Smyth.*

J. E. W.

IN RE MAHER AND NUGENT'S CONTRACT.

Ross, J., for the M.R. 1910. March 24.

Vendor and Purchaser—Conditions of sale—Misleading condition—Landlord and tenant—Land Acts—Subdivision—Consent of landlord—Limited owner—Tenant in tail—Estoppel—Power to consider real date of instrument.

Section 17 of the Land Law (Ireland) Act, 1896, gives a limited owner a power of effecting a partition in a manner in which he could not do before, but there is nothing to make the procedure in accordance with that section imperative on an unincumbered absolute owner. If an unincumbered absolute owner gives his consent to a subdivision in writing, that is sufficient.

A sub-division effected on 1st May may be validated by a subsequent consent of the landlord given on 6th May.

Tobin v. *Cleary* (1. R. 7 C. L. 17) followed.

Save in certain exceptional circumstances, the Court may consider the real date of the execution of an instrument, when that date is different from the date appearing by the instrument itself.

VENDOR AND PURCHASER SUMMONS.

This summons was taken out for a declaration that the objections of David Nugent to the title to the hereditaments

(1) [1908] 1 Ch. D. 681.
(2) 53 W. R. 150.
(3) [1907] 1 Ir. R. 51.
(4) L. R. 10 Ch., at p. 480.

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comprised in the above-mentioned contract had not been sufficiently answered by the vendor, and that a good title had not been shown, and for an order that the vendor forthwith return to the said David Nugent the deposit of £705 paid by him. The premises, the subject of the present summons, were offered for sale on the 10th of December, 1909, being described in the conditions of sale as lot 2, together with other premises described as lot 1. The description of the premises in the particulars was as follows:

"Lot 2 consists of 188A. 2R. 12P. or thereabouts, statute measure, of fine old pasture land, held along with lot 1 under a statutory tenancy under the Land Law (Ireland) Acts, at the annual rent of £198, being portion of a rent of £418 10*s.* fixed by order of the Land Commission (second statutory term), dated 16th July, 1907, Record No. 2,221. The vendor has signed an agreement to buy the same for £4,643 under the Irish Land Act, 1903. The interest on the purchase-money paid pending the completion of the sale amounts to £162 10*s.* yearly, while after the sale the purchase annuity will be £150 18*s.*

"Particulars.—The two lots for sale originally formed one holding in the occupation of the vendor's father, Mr. Edward Maher. The tenancy commenced in or about the year 1867, under an agreement in writing for seven years. After the expiration of the term the said Edward Maher obtained a renewal of his tenancy, and on the expiration of the renewed tenancy continued in occupation as a yearly tenant; and shortly after the passing of the Land Act of 1881 he had a judicial rent fixed. By an order of the sub-Commission dated the 16th July, 1907, Record No. 2,221, a second term rent of £418 10*s.* was fixed on the entire farm."

On the 1st May, 1908, with the consent of the landlord, the said Edward Maher assigned portion of his original farm, comprising the lands and house, &c., in lot. 1, to his son Thomas Francis Maher, subject to a portion of said rent, amounting to £220 10*s.*, and also assigned the remainder of his original farm, comprising the lands in lot 2, to his son, William Joseph Maher, subject to the balance of said rent, amounting to £198.

The landlord, Algernon Thomas St. George Caulfield, agreed to sell to the said Thomas Francis Maher and William Joseph

Maher their two respective holdings under the Irish Land Act, 1903; and accordingly the said Thomas Francis Maher and William Joseph Maher signed the usual agreements to purchase their holdings for the sums of £5182 and £4643 respectively.

Both lots are situate in the townland of Kilpack, barony of Clanwilliam, and county of Tipperary—lot 1 containing 256A. 3R. 30P. statute measure, or thereabouts, and lot 2, 188A. 2R. 12P. statute measure, or thereabouts.

Condition 5 of the conditions of sale was as follows:—

"The lots for sale originally formed one holding, which was divided into two holdings with the landlord's consent; and by assignments dated respectively the 1st May, 1908, the lands comprising lot 1 were assigned by Edward Maher to Thomas Francis Maher, and the lands comprising lot 2 were assigned by Edward Maher to William Joseph Maher. The second term judicial rent of £418 10*s*., fixed by an order of the sub-commission, dated the 16th July, 1907, Record No. 2,221, has been apportioned as to £220 10*s*. upon lot 1, and as to the balance, amounting to £198, upon lot 2. The tenancy in the original holding was created in or about the year 1867, under an agreement in writing for seven years; but neither the original nor a copy of this agreement is forthcoming, and each purchaser shall be furnished with a statutory declaration to be made by the said Michael Maher, the original tenant (if required), that he was in occupation of this farm under said agreement of 1st November, 1867, and that on the expiration thereof, or on the expiration of a subsequent letting for a short term, he became an ordinary yearly tenant thereof, and each purchaser shall accept such declaration as evidence of the fact, and no other evidence as to the creation of the tenancy shall be required. No purchaser shall make any requisition or objection in respect of or in connexion with the said agreement or the title prior to the 1st January, 1881, nor as to the division of the said holding, nor the apportionment of the said judicial rent."

Condition 6 was as follows:—

"The landlord from whom the said farm is held, Algernon

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Thomas St. George Caulfield, has lodged an originating application with the Estates Commissioners for the sale of his estate under the Irish Land Act, 1903; and Thomas Francis Maher, one of the vendors, has signed an agreement dated 1st day of May, 1908, to purchase lot 1 for the sum of £5182. The said William Joseph Maher, the other vendor, has signed an agreement, dated the 1st May, 1908, to purchase lot 2 for the sum of £4643. A copy of each of the said agreements and of the said fair rent order will be produced at the sale, and may be inspected at the office of the vendors' solicitors for one week prior thereunto during business hours, and each purchaser shall be deemed to have full notice of the contents thereof, respectively, and of the state of the property as to fences, boundaries, insurance, and all other matters."

The facts as stated in the foregoing particulars and conditions are correct, save that the landlord's consent to the sub-division was not given till the 6th May, 1908, but the assignment from Edward Maher to William Joseph Maher, which was dated the 1st May, 1908, was not in fact executed till the 21st October, 1908, for the reasons stated in the answers to requisitions given below. The landlord's consent was indorsed upon it in the following terms:—

"I, the undersigned A. T. St. George Caulfield, of Donamon Castle in the county of Roscommon, Esquire, the landlord of the premises comprised in the within indenture of assignment, hereby testify my consent to the subdivision and assignment of the premises in accordance with the terms of the within written indenture. In witness whereof I have hereunto set my hand this 6th day of May, 1908.

"A. T. ST. GEORGE CAULFIELD."

The said A. T. St. George Caulfield was on the 6th May, 1908, tenant in tail male in possession of the said lands, but on the 28th January, 1910, he executed a disentailing deed which was duly enrolled on the 1st February, 1910, prior to the issue of this summons.

David Nugent purchased the premises described as lot 2 in the above-mentioned particulars and conditions of sale, under the

said conditions of sale, for the price of £2350, on the 10th December, 1909, and paid to the auctioneers as deposit and auction fees the sum of £705 on the said date.

The purchaser's requisitions upon title, and the vendor's answers to them, upon which the present summons was grounded, were as follows :—

Requisition 1.—The purchaser objects to the assignment of the 1st May, 1908, on the ground that it was in violation of the provisions of section 5 (3) of the Land Law (Ireland) Act, 1881.

Answer.—The vendor relies on condition No. 5, as precluding the purchaser from raising this point; but in any case the consent related back to the date of the assignment, and was operative: see *Tobin* v. *Cleary* (1), on a corresponding provision of an earlier statute.

Requisition 2.—The purchaser further objects to the title on the grounds that the sub-division of the holding was not carried out in accordance with the provisions of section 17 (1) of the Land Law (Ireland) Act, 1896.

Answer.—The vendor relies on condition No. 5 as precluding the purchaser from raising this point; but, without prejudice, the vendor points out that the use of Form No. 62 in the rules is optional, and that, owing to pending negotiations for purchase, it became unnecessary and meaningless to adopt the prescribed procedure, as the relation of landlord and tenant was to be altered into that of vendor and purchaser.

Requisition 3.—The purchaser also objects that this agreement to purchase dated the 1st May, 1908, was illegal and inoperative, on the grounds (*a*) that it was a device for the purpose of enabling the landlord to receive in respect of the lands held under the statutory tenancy a sum in excess of the legal limit, (*b*) that at the date of the said agreement, the said William J. Maher was not a tenant in occupation of the said lands within the meaning of the Land Purchase Acts, and (*c*) that the said agreement states that the tenant had been residing on and in occupation of the holding since March, 1908, at the annual rent of £198, payable under a statutory tenancy under the Land Law (Ireland)

(1) Ir. R. 7 C. L. 17.

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Acts, and fixed by order of the Irish Land Commission, dated the 16th July, 1907, whereas, in fact, William J. Maher was not in occupation of the said lands in March, 1908, and the annual rent of £198 was not payable under a statutory tenancy, and the said rent of £198 was not fixed by any order of the Land Commission.

Answer.—The conditions of sale set forth fully and truly the facts connected with the rent, division of the holding, and agreement for sale, and the purchaser bought with full knowledge thereof, and the vendor relies on conditions Nos. 5 and 6. No warranty, express or implied, was given that the Estates Commissioners would make the advance applied for. The agreement was neither illegal nor inoperative: (*a*) the division of the holding was a perfectly reasonable and natural transaction by a father advanced in years for setting up his two sons in life; (*b*) William J. Maher was a tenant in occupation of the lands within the meaning of the Land Purchase Acts; (*c*) the agreement fairly states in a succinct form the facts as to the rent, &c., having regard to the assignments.

Requisition 4.—The purchaser objects that the consent indorsed on the assignment of the 1st May, 1908, is inoperative on the grounds—(1) that it was not executed until the 6th May, 1908, which was subsequent to the agreement for purchase; and (2) that no evidence is forthcoming that A. St. George Caulfield was absolutely entitled to the lands, and able to consent to a subdivision of the holding.

Answer.—1. The agreement for sale was not in fact executed till the 21st October, 1908, but inasmuch as under the Land Commission Rules, interest on the purchase-money is collected by the Land Commission only from the date of the agreement, the agreement was dated by the landlord, in accordance with a very usual practice, as of the gale day prior to the date of lodgment, in order that the Land Commission might collect the interest for him as from that time. 2. Production of the rent receipts should be sufficient evidence that A. St. George Caulfield was the landlord, but if required a statutory declaration will be obtained.

The purchaser refused to complete.

Molony, K.C., for the purchaser:—

No title is shown. There was no effective consent by the landlord to the subdivision: Rules 166, 167; Cherry, pp. 760, 800. Under section 17 of the Land Law (Ireland) Act, 1896, the consent must be in Form 62B. The assignment without consent is void for all purposes: *Fogarty* v. *Shanahan* (1); Cherry, p. 242. Subdivision is against public policy. Section 17 applies even to an absolute unincumbered owner (see Form 64*a*). The landlord here was a tenant in tail.

Section 17 points out a particular way of doing an act that would otherwise be illegal: *Fingall* v. *Everard* (2). The subdivision and the signing of the agreement to purchase took place on the same day. The landlord's consent of May 6th might be held to relate back, if nothing had intervened, but on May 6th there was no tenancy: *R.* (*Fitzwilliam*) v. *Wicklow Co. Council* (3). No doubt no warranty was given that the Estates Commissioners would make the advance; but if there was no tenancy at the date of the purchase agreement, there is no jurisdiction to advance the purchase-money. The conditions of sale do not correctly describe the facts.

Walker, K.C., for the vendor:—

The subdivision was a perfectly reasonable transaction. This is shown by the affidavits. The real date of the agreement for sale must be looked to. There can be no estoppel where the effect of such estoppel would be to negative the main purpose of the transaction: *Colonial Bank* v. *Hepworth* (4). There is never an estoppel as to the date of a document: *Jayne* v. *Hughes* (5); *Reffell* v. *Reffell* (6). We told them the true date in our answers to requisitions. The landlord's consent to an assignment may be given at any time after the date thereof: *M'Carthy* v. *Bennett* (7). Section 17 is an enabling and not a limiting section: *Tobin* v. *Cleary* (8). A tenant in tail is for practical purposes not a

(1) [1896] 2 I. R. 273.
(2) 35 I. L. T. R. 134.
(3) 40 I. L. T. R. 180.
(4) 36 Ch. D., p. 36, at p. 53.
(5) 10 Ex. 430.
(6) L. R. 1 P. & D. 139.
(7) [1899] 2 I. R. 622.
(8) I. R. 7 C. L. 17.

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limited owner. He, the tenant in tail, has now executed a disentailing deed, and the property was wholly unincumbered. Up to the last moment there is a *locus poenitentiae*; the title may be completed: *Games* v. *Bonnor* (1). In the case of a limited owner, or the owner of an incumbered estate, the procedure indicated by section 17 must be complied with in order to bind remaindermen or incumbrancers; but in the case of an absolute owner of an unincumbered estate the adoption of such procedure is merely optional.

Even if the date of the agreement be taken as May 1st, the landlord carried out the whole transaction *uno flatu*.

Molony, K. C., in reply.

Ross, J.:—

Only one question of importance seems to me to arise, and that is, whether the machinery laid down by section 17 of the Land Act of 1896 is obligatory in every case when it is sought to create effective tenancy by way of subdivision. It is necessary to consider what the law was before the Act of 1896. By section 2 of the Act of 1881 the tenant was absolutely prohibited from subdividing or subletting without consent. In order to make a valid subdivision, the consent of the landlord in writing had to be obtained. But during the fifteen years from 1881 to 1896 there was no particular way provided in which that consent was to be given. There is no particular form of writing laid down like the form provided by the Act of 1896. The Act of 1896 is in part a Land Purchase Act, and in part a Land Law Amendment Act. The last-named part of the Act aims for the most part at stopping up all the holes in the land code made by counsel for the landlords during the previous fifteen years. The counsel for the landlords had seized on every technical point, such as that a portion of the holding had been surrendered, or the like; and this Act is aimed at filling up these holes in the interest of the tenant. We turn then to section 17 of the Act; we find that it provides: "The landlord and tenant of any holding may at any time . . . agree in the prescribed manner, and subject to the prescribed rules

(1) 33 W. R. 64.

and conditions, in regard to all or any of the matters following .... (*b*) the partition or division of the holding." In so far as a limited owner is concerned this gives a limited owner a power of effecting an effective partition in a manner in which he could not do before. And it would be absolutely necessary for an incumbered owner to have recourse to this provision. But in so far as an unincumbered absolute owner is concerned there is nothing to make it imperative on him at all. Consequently I hold that the Act of 1896 does not alter the position. As far as he is concerned there is nothing imperative in it. He may proceed by the procedure of section 17, if he think right. In this case he has not gone under section 17, but he has given his consent in writing, and that is sufficient. The answer to requisition 1 is that the sub-division was effected on the 1st May, and validated by the landlord's consent on the 6th May. Under the authority of *Tobin* v. *Cleary* (1) the subsequent consent was perfectly good and validated the original transaction. That is very good, says Mr. Molony, so long as the position was not altered; but on the 1st May there was not merely the subdivision, but also a deed by which the tenant, the present vendor, became equitable owner. That made such a subsequent consent impossible. But what was the real date of the deed? I am of opinion that, except in certain exceptional circumstances, there is always power to consider the real date of an instrument. It is admitted now that the deed was not executed till the 18th October. What was the state of the parties on the 6th May? It was that a subdivision and assignment had been effected with the written consent of the landlord, and that is quite enough to validate the transaction.

The next point is that the agreement to purchase was illegal, on the ground that it was a device to enable the landlord to receive a sum in excess of the legal limits. Is this such a device? Nothing could be more natural than for a tenant to divide his large farm in the county Tipperary, on which he was not living, and to set up his two sons in possession of separate farms. He divided it and put a certain portion of the rent upon each of the portions divided. I believe the sole object was to provide for the

(1) I. R. 7 C. L. 17.

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tenant's sons. Besides, the purchaser was fully informed of these proceedings, and must have been aware that such a contention might be put forward.

Again, it is objected that William J. Maher was not a tenant in occupation of the lands. The evidence is that he was in occupation.

Further, it is objected "that no evidence is forthcoming that A. St. George Caulfield was absolutely entitled to the lands and able to consent to a subdivision of the holding."

It is quite true that a tenant in tail is a limited owner within the meaning of the Settled Land Act; but before the summons was brought on, the landlord barred the entail, and the question of limited ownership no longer arises. I need not deal with the subsequent requisitions, as they are not relied upon.

On the whole case, though there is a good deal to be examined into, and there might be something to make a purchaser anxious, I think that there is no reason for further anxiety. I think the conditions of sale are not misleading, and that the whole facts are very fully put forward. The purchaser knew what he was buying quite well. If the term "present tenancy" had been applied to a portion of the farm before the subdivision, that would have been a different matter. On the whole, I am of opinion that the purchaser has got a perfectly good title. I must further strengthen his title by giving costs against him.

Solicitors for the vendor: *S. & R. C. Walker.*

Solicitor for the purchaser: *D. J. Higgins.*

A. E. C.

WELLAND *v.* TOWNSEND.

(1909. No. 209.)

Wylie, J., for the M.R.
1910.
March 15, 18.

Will—Gift to children—Power of appointment—Joint tenancy or tenancy in common.

A testator gave real and chattel real property to M., and desired that what he had left to her "she shall not have power to alienate or dispose of or incumber it in any manner whatsoever, but that it shall regularly descend to her children in such proportion or proportions as she may think right or proper."

M. died without exercising the power, leaving four children.

Held, that the children took as joint tenants.

ORIGINATING SUMMONS.

William Jolly at the date of his will and of his death was seised for an estate in fee-simple in possession of part of the lands of Corballis and Tubberbonny, otherwise Cookestoone, in the barony of Coolock and county of Dublin, and was absolutely entitled in possession to the houses 36 and 37 South Frederick Street, held under two leases both dated December 3rd, 1783, for the term of 999 years, the houses 29 to 34 (inclusive) Kildare Street, held under lease dated May 24th, 1759, for the term of 900 years, and the houses 7 and 8 Henry Street, held under lease dated March 24th, 1766, for lives renewable for ever, all which houses are situate in the city of Dublin. William Jolly made his will, dated January 22nd, 1833, and thereby devised the income of the said house in Henry Street, and the said lands of Corballis and Tubberbonny to his wife, Maria Jolly, for life, and, subject to such life estate, devised the said lands of Corballis and Tubberbonny and the said houses in Henry Street, South Frederick Street, and Kildare Street, to Sophia Mills, wife of John Mills. Further on in the will came the following clause: "And it is my will and desire that what I have left in this will to Sophia Mills that she shall not have power to alienate or dispose of or

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incumber it in any manner whatever, but that it shall regularly descend to her children in such proportion or proportions as she may think right or proper so to do." The testator left the residue of his property to be divided amongst the children of the said John Mills, share and share alike, and appointed his wife and Robert Colville his executors. The testator died on May 17th, 1833, without having revoked or altered his said will as to the disposition of the said lands and houses, and probate was granted to the said Robert Colville. Robert Colville died in the year 1849, and December 23rd, 1891, letters of adminisfration *de bonis non* of the personal estate of the testator were granted to Sophia Welland, otherwise Mills, daughter of the said John Mills by a former marriage, and one of the residuary legatees in the said will named. Maria Jolly, the widow of the testator, died in October, 1856, and thereupon the said Sophia Mills became entitled in possession to all the said lands and houses. She died in May, 1862, intestate, leaving her surviving four daughters, namely, Sarah Jeans, otherwise Mills, Jane Mills, Maria Mills, and Augusta Mills. Sophia Mills never had any other children besides the said four danghters, and never exercised by deed or will the power of appointment (if any) given to her by the will of the said William Jolly in respect of the said lands and houses. Sarah Jeans, otherwise Mills, died intestate without issue in October, 1878. Maria Mills died on November 11th, 1894, intestate; Augusta Mills died December 3rd, 1899, intestate. No letters of administration of the personal estate of Sarah Jeans, otherwise Mills, Maria Mills, and Augusta Mills was ever taken out. Jane Mills made her will, dated May 13th, 1886, and died on November 26th, 1907. Under the will of Jane Mills, the plaintiff, the Reverend Cecil Welland, became absolutely entitled to the estate and interest of Jane Mills, and agreed to sell the same to the defendant, Thomas Loftus Townsend. The defendant, by his requisitions on title, contended that the said four daughters of Sophia Mills took as tenants in common under the will of William Jolly, and required that administration should be taken out to Sarah Jeans, Maria Mills, and Augusta Mills, and that the administrators should join in the conveyance. The plaintiff contended that the said four daughters took as joint tenants, and

that Jane Mills, as survivor, became entitled to the whole interest of William Jolly in the said lands and houses, and, therefore, that the necessity for taking out administration did not arise. The defendant required the plaintiff to take out a summons to decide the point; and accordingly this summons was taken out by plaintiff to have the question determined, whether the said children became entitled to the said lands and houses as joint tenants or as tenants in common. A question was also asked, whether Sophia Mills took an absolute estate in the said lands and houses; but it was admitted at the hearing that she took only a life estate.

Arthur V. Matheson, for the plaintiff:—

The Court can, under Order XVI., Rule 46, appoint the defendant to represent the interest of Sarah Jeans, Maria Mills, and Augusta Mills (1).

Sarah Mills took a life estate only with a power of appointment to her children; there is no express gift in default of appointment, but it is submitted that there was an implied gift to the children in default of appointment, and that they took as joint tenants. In *In re Phene's Trusts* (2) a sum of money was given to executors in trust for M. for life, and after her death "in trust for the benefit of her children to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of M. Lord Romilly held that the meaning of the testator was, that the executors were to divide the fund, and that the Court in their place must also divide it, that is, give it to the children who survived M. as tenants in common. In *Armstrong* v. *Armstrong* (3) the testator gave his estate to his wife absolutely and for the benefit of herself and children, and appointed her executrix. He left his wife and six children surviving. The widow proved the will and died. James, V.-C., held that there was no context importing words of severance, as Lord Romilly thought there was in *In re Phene's Trusts* (2), and that the children took as joint tenants, it being immaterial

(1) An order to that effect was made. [REP.]

(2) L. R. 5 Eq. 346. (3) L. R. 7 Eq. 518.

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whether it was a gift to the wife for life with remainder to the children, or a gift to the wife and children equally.

Sealy, for the defendant:—

The four daughters took as tenants in common. See Jarman on Wills (5th ed.), p. 1129, that a gift implied from a power of distribution or selection creates a tenancy in common. In Theobald on Wills (6th ed.), p. 392, it is stated that where there is a power to appoint to persons, which would authorize a tenancy in common, the Court, if compelled to exercise the power, will make the legatees tenants in common. *In re Phene's Trusts* (1) is there referred to, also *Wilson* v. *Duguid* (2), where the trust was to assign the premises unto and amongst such of his children and in such manner and shares as the father should appoint. The Court leans in favour of a tenancy in common. *Armstrong* v. *Armstrong* (3) was a different case; there were no words there giving any power of distribution.

Arthur V. Matheson, in reply.

March 18.

WYLIE, J.:—

The real question raised by the summons in this case is, whether upon the true construction of a clause in the will of William Jolly, the children of Sophia Mills became entitled to certain property as joint tenants or tenants in common. The testator by his will left certain property, including both real and chattel real estate, to his wife for life, and after her death to Sophia Mills, wife of John Mills; and further on in the will follows this clause, upon which the question I have to decide arises: "And it is my wish and my desire that what I have left in this will to Sophia Mills that she shall not have the power to alienate or dispose of or incumber it in any manner whatsoever, but that it shall regularly descend to her children in such proportion or proportions as she may think right or proper so to do." Now it was admitted by counsel on both sides, and I think rightly admitted, that on the true construction of this will Sophia Mills

(1) L. R. 5 Eq. 346. (2) 24 Ch. D. 244. (3) L. R. 7 Eq. 518.

took only a life estate, and that on her death the property in which she had such life interest passed under the above clause. In that clause there is, it appears to me, a clear and express gift to all the children of Sophia Mills, though there is added to the gift a power to Mrs. Mills, if she thinks fit so to do, to appoint the proportions in which the children shall take, and the question I have really to decide is, whether this added power is so mixed up with the gift itself as to be inseparable from the gift, and, if inseparable, whether it has the effect, without the power being exercised, of changing what would otherwise be a joint tenancy into a tenancy in common; because I think it is clear that if the clause had stopped at the word "children," they would undoubtedly have taken the property as joint tenants. There is no other clause in the will that throws any light upon the construction of this clause, except perhaps the residuary clause, and the only effect of that is to show that the testator knew how to give a tenancy in common. By that clause he leaves his residuary real and personal estate to be divided amongst the same children share and share alike. Now the contrast between the words used in two clauses in a will, such as these, was a circumstance to which Sir E. Sullivan, M.R., attached great weight in *Jury* v. *Jury* (1) in arriving at the conclusion that one of the clauses in a will, of doubtful and difficult construction, conferred a joint tenancy. That case is also valuable in showing that you may under a will have a joint tenancy until a contingency happens, when it may become a tenancy in common. I was referred by Mr. Sealy to a passage in Theobald on Wills where he lays down, at p. 392, that "where there is a power to appoint to persons, which would authorize a tenancy in common, the Court if compelled to exercise the power will make the legatees tenants in common." One of the cases cited in support of that proposition is *In re Phene's Trusts* (2), but in that case the property was given to the executors to apply for the benefit of a class as they might think most for their advantage, and the executors having died in the lifetime of the testator, the trust had to be carried out by the Court, and the words of trust suggested division and distribution. Another case

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(1) 9 L. R. Ir. 207. (2) L. R. 5 Eq. 346.

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is *Wilson* v. *Duguid* (1); in that case the property was given in trust for C. for life, and after his decease upon trust to assign the premises *unto* and *amongst such* of his children, and in such manner, shares, and proportions, as C. should appoint. There there was no gift to any of the children except *such* as C. should appoint to, and, C. having made no appointment, the Court was called upon to practically exercise the power as being coupled with a trust, or decree a gift by implication to all equally. But in the present case the Court is not called upon to execute any trust or exercise any power. There is, in my opinion, in this will a clear intention to give the property to all the children, subject to this, that the tenant for life may, if she chooses, exercise a power of appointing the proportions in which they shall take; and if no appointment is made, the gift in joint tenancy stands.

Solicitor for the plaintiff: *Stephen Gordon & Son.*

Solicitor for the defendant: *W. Geoghegan.*

W. L.

(1) 24 Ch. D. 244.

IN THE MATTER OF THE ESTATE OF SUSAN PRINGLE. *Wylie, J.*
1910.
Mar. 18, 22.
April 4.

Land Purchase Acts—Irish Land Act, 1909 (9 *Edw.* 7, *c.* 42), *ss.* 57 *and* 58—*Estate situated in a congested districts county—Restrictions as to sale of—s.* 58, *sub-s.* 2, *proviso—Construction—Originating request lodged with Land Commission prior to crucial date—Agreement for purchase entered into with Congested Districts Board after crucial date—Bonus—s.* 6, *sub-s.* 2—*Resale—Financing—s.* 13 (*b*) ii—*s.* 3, *sub-s.* 3.

Section 58, sub-section 2, of the Irish Land Act, 1909 (9 Edw. 7, c. 42), has reference only to the sale of an estate by direct sales to tenants and others entitled to purchase holdings or parcels under the Land Purchase Acts, whether such sales are carried out pursuant to an originating application or request, and the absolute and general prohibition contained in sub-section 1 stands unaffected by sub-section 2.

Where an originating request has been lodged with a view to the sale of an estate to the Land Commission, prior to the 24th November, 1908, and, subsequently to that date, an agreement for the purchase of the estate is entered into with the Congested Districts Board, such an agreement comes within the scope of section 6, sub-section 2, of the Irish Land Act, 1909, and a bonus of 12 per cent. will be payable.

QUESTIONS of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner, pursuant to sect. 23 (1) of the Irish Land Act, 1903.

The facts as stated in the memorandum of the Estates Commissioners were as follows:—In the year 1908, the Estates Commissioners informed the vendor's solicitor that they were willing to purchase the estate offered for sale in this matter; and, in the month of July, 1908, the inspection of the estate was commenced, and an originating request for the sale of the lands, on behalf of the vendor, with all maps and documents, was, on the 12th August, 1908, duly lodged in the office of the Estates Commissioners. The said lands, which were situated in a congested districts county, consisted of tenanted and untenanted lands, containing 7522A. 1R. 29P., and formed a congested estate.

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The certificate of *prima facie* title was lodged on the 25th October, 1909, and form "E" was issued by the Estates Commissioners on the 2nd November, 1909, and, on the 18th November, 1909, the purchase-money title, together with all the necessary documents to vouch same, was lodged in the Record Office of the Land Commission, but no formal proposal to purchase the estate was received.

At the request of the vendor, the following questions were submitted:—(1) Whether the Estates Commissioners, having regard to section 58 of the Irish Land Act, 1909, could purchase the congested estate, offered for sale in this matter, without the consent of the Congested Districts Board? (2) Whether, if the sale of this estate was carried out by the Congested Districts Board, a bonus of 12 per cent. would be payable on the purchase-money? and (3) Whether, if the Congested Districts Board bought this estate, they could resell on a 3¼ per cent. purchase annuity?

W. M. Jellett, K.C., for the vendor:—

Having regard to the apparent inconsistency between sub-sections 1 and 2 of section 58 of the Act of 1909, the question is, on what principle is the Court to act? The difficulty of construing sub-section 2 cannot be got rid of by leaving out the words "or request." Some construction must be found that will give effect to these words. No effect can be given to them without construing the phrase "persons other than the Congested Districts Board" in the earlier part of sub-section 2 as comprising the Land Commission. The words must be construed, if possible, so as to give a sensible meaning to them, according to the rule referred to by Bowen, L.J., in *Curtis* v. *Stovin* (1). The words of sub-section 1 are general. Those of sub-section 2 are particular. Sub-section 1 deals with a larger subject-matter than sub-section 2. The true principle of construction is to read the particular as an exception out of the general: *Thorpe* v. *Adams* (2); *The Queen* v. *Champneys* (3); *Garnett* v. *Bradley* (4). "Where

(1) 22 Q. B. D., at p. 517.
(2) L. R. 6 C. P. 125.
(3) *Ibid.* 384.
(4) 3 A. C. 944.

there are two inconsistent enactments it must be seen if one cannot be read as a qualification of the other": James, L.J., in *Ebbs* v. *Boulnois* (1). A similar difficulty arose in construing 3 & 4 Wm. 4, c. 27, sect. 42, and 3 & 4 Wm. 4, c. 42, sect. 3. The latter was treated as an exception out of the former: *Hunter* v. *Nockolds* (2). There is another principle of construction that is applicable, if you are driven to it, *i.e.*, that where two sections of an Act are repugnant, the later section is to prevail over the earlier: Keating, J., in *Wood* v. *Riley* (3); see also *Walker* v. *York Corporation* (4). With regard to the question of the bonus, if the sale is completed, the vendor is entitled to be placed in the same position as if the sale had gone through to the Land Commission. The vendor had taken the necessary steps required by section 6, sub-section 2, before the crucial date. It was immaterial to her whether the sale was carried through to the Land Commission or to the Congested Districts Board. On the fair construction of the section she should not be prejudiced because one public body is substituted for the other. "In the construction of statutes, you must not construe words so as to take away existing rights, unless there are plain words showing that was the intention of the Legislature": Bowen, L.J., in *In re Cuno* (5).

Serjeant O'Brien, K.C., for the Congested Districts Board:—

The only rational construction that can be put on section 58 of the Irish Land Act of 1909 is, that the consent of the Congested Districts Board is necessary in all cases where the estate is situated in a congested districts county. The section contains two substantive enactments, each with its appropriate proviso. No doubt the word "person" as defined by the Act of 1870 includes a "body corporate," yet, in construing sub-section 2 of section 58, the words "persons other than the Congested Districts Board" need not necessarily include the Land Commission. The only possible way to work out the section is to confine

(1) L. R. 10, Ch. App., at p. 484.
(2) 1 Mac. & G. 640.
(3) L. R. 3 C. P., at p. 27.
(4) [1906] 1 K. B. 724.
(5) 43 Ch D., at p. 17.

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sub-section 1 to the Land Commission, and sub-sect. 2 to persons other than the Land Commission. With regard to the argument that sub-section 2 is to be taken as an exception out of sub-section 1, if what is to be taken out of sub-section 1 is a congested estate situated in a congested districts county, the effect would be to except out of the sub-section the very class of estate which it was intended the Congested Districts Board should have power to purchase.

The Solicitor-General (*C. A. O'Connor, K.C.*), for the Treasury :—

Sub-section 1 of section 58 of the Act of 1909 is a complete code in itself, and is independent of sub-section 2, which deals with a different subject-matter and a different class of persons. "Persons" in sub-section 2 clearly refers to persons other than the Land Commission or the Congested Districts Board. There would be no object in including the Land Commission in the word "persons," as that body is already excluded. The words "originating . . . request" in the proviso to sub-section 2 are not used in any technical sense, as necessarily involving a sale to the Land Commission.

With regard to the question of the bonus, you must first have an agreement. When you have the agreement, then the effect of section 6 of the Act of 1909 is to give to it a fictitious date. Further, the agreement must be entered into with the body with whom the sale is ultimately carried out. Section 6, sub-section 2, implies a continuous proceeding with either body. There is nothing in the sub-section to indicate that a transfer from one body to the other was contemplated.

April 4. WYLIE, J. :—

In this case the Estates Commissioners have, at the request of the vendor, submitted to me a number of questions arising on the construction of sections 6, 13, and 58 of the Irish Land Act, 1909. [His Lordship stated the facts as set out in the memorandum of the Estates Commissioners.]

In this state of facts the first question I am asked to decide is,

Can the Estates Commissioners, having regard to section 58 of the Irish Land Act, 1909, purchase the congested estate, offered for sale in this matter, without the consent of the Congested Districts Board?

Section 58 consists of two sub-sections. Sub-section 1 provides "that the Land Commission shall not, after the passing of this Act, enter into an agreement for the purchase of any land situated in a congested districts county, save with the consent of the Congested Districts Board: Provided that this sub-section shall not apply in the case of any land required for the purposes of the Evicted Tenants (Ireland) Act, 1907."

Sub-section 2 provides that "no congested estate situated in a congested districts county shall, after the passing of this Act, be sold under the Land Purchase Acts, to persons other than the Congested Districts Board, without the consent of that Board, which consent shall not be withheld unless the Board undertake to enter into an agreement or to send a final offer for the purchase of the estate within one year: Provided that this sub-section shall not apply in the case of any sale of a congested estate in pursuance of an originating application or request lodged before the passing of this Act."

Now, on reading those two sub-sections together, it is obvious to anyone familiar with the terminology of the Land Purchase Acts and Rules that no difficulty could arise on the construction of the entire section if the words "or request" were omitted from the proviso to sub-section 2. But Mr. Jellett, on behalf of the vendor, contends, and I think rightly contends, that a difficulty of construction cannot be got rid of by simply leaving out those words, and that some construction must be found that will give some effect to them. He also contends that no effect whatever can be given to those words without construing the phrase "persons other than the Congested Districts Board" in the earlier part of sub-section 2 as comprising the Land Commission. Now in construing the Act of 1909, which is in great measure an amending Act, I think it is essential to bear in mind the different methods in which land could be sold under the Land Purchase Acts prior to the Act of 1909, and also the phraseology used in the Acts and Rules with respect to such sales.

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Prior to the Act of 1909 an owner of land could sell it under the Land Purchase Acts in three different ways—(1) He could sell an estate situated in any county in Ireland, whether tenanted, untenanted, or both combined, to the Land Commission; (2) he could sell any such estate to the Congested Districts Board if they required it for the purposes of their Acts; or (3) he could sell it, so far as it consisted of holdings, to the occupying tenants, and the rest of it in parcels to certain classes of persons specified in the Acts.

Now, the phrase that is used throughout the Land Act of 1903, and the rules thereunder, to describe and distinguish this third class of sales is "sale of an estate to persons other than the Land Commission." This phrase will be found in section 23, sub-section 12, section 24, sub-sections 1 and 3, Rules of 23rd October, 1903, Rule 1, Rules of 4th December, 1903, Order IV., Rule 3, Order IX., Rule 1; and the word "persons" in such phrase does not include the Congested Districts Board.

Now, bearing all this in mind, let us look at sections 57 and 58 of the Act of 1909. Section 57 provides that "the Congested Districts Board shall not, after the passing of this Act, enter into any agreement for the purchase of any land which is not situated in a congested districts county," and section 58, sub-section 1, already cited, prohibits the Land Commission from entering into an agreement for the purchase of any land situated in a congested districts county without the consent of the Congested Districts Board. Therefore, without section 58, sub-section 2, the law as to sales under the Land Purchase Acts would have stood thus—An owner of any estate not situated in a "congested districts county" could only sell it to the Land Commission, or to persons other than the Land Commission, the Congested Districts Board being excluded from those "persons" by section 57, and the owner of any estate situated in a congested districts county could only sell it to the Congested Districts Board, or to "persons other than the Congested Districts Board," the Land Commission being excluded from "persons" by section 58, sub-section 1. Therefore, if sub-section 2 had not been added to section 58, it is, I think, absolutely clear that no estate, congested or uncongested, situated

in a congested districts county, could be sold to the Land Commission after the passing of the Act of 1909, without the consent of the Congested Districts Board. But the owner could have sold it either to the Congested Districts Board, or, through the medium of the Land Commission, to tenants and other persons to whom a sale of parcels under the Land Purchase Acts is authorized.

Now, let us look at section 58, sub-section 2, and see, if we can, what is its precise scope and purpose? In the first place, leaving out the proviso for a moment, it is not an enabling section. It is a prohibitive enactment. Having by sub-section 1 absolutely prohibited the future sale of any estate, congested or uncongested, situated in a "congested districts county," to the Land Commission, without the consent of the Congested Districts Board, the Legislature proceeds by sub-section 2 further to prohibit the sale of a congested estate, so situated, to persons other than the Congested Districts Board, without the consent of that Board, subject to this qualification, that the consent could not be withheld for more than one year without an undertaking to buy.

So far it seems to me to be absolutely clear that a sale to the Land Commission is not within the purview of sub-section 2 at all, the only object of that sub-section being to prohibit, with the qualification mentioned, future sales of such congested estates to the occupying tenants without the consent of the Congested Districts Board, the reason being obvious, that such sales would merely perpetuate congestion, and prevent the Congested Districts Board from carrying out the principal object of its creation, viz., the relief of congestion.

Let us proceed now to the consideration of the proviso to sub-section 2 of section 58, and see whether effect cannot be given to every word in that proviso without contradicting or altering the clear and express provisions of sub-section 1. The proviso is only intended to exclude from the operation of sub-section 2 certain pending cases to which it would otherwise apply; and if I am right in the view already expressed, that sub-section 2, without the proviso, has no application at all to sales to the Land Commission, the proviso *prima facie* cannot extend its operation to such sales.

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But Mr. Jellett contends that the words "or request" in the proviso show conclusively that sub-section 2 was intended to include and apply to sales to the Land Commission, and that, unless it does so apply, no effect whatever can be given to the words "or request." Now, in order to understand clearly, and properly to construe, many of the provisions of this Act, and more particularly provisoes that are intended to preserve existing rights, one must know and bear in mind not only the Land Purchase Acts and Rules thereunder, but also the previous practice and procedure of the Estates Commissioners who conducted their proceedings in very many cases without any regard to the provisions either of the Act or Rules. For example, take the present case. By the Act of 1903, and Rules thereunder, the first step towards a sale of an estate to the Land Commission, under section 6, was the lodgment by the owner of an originating request in the office of the Land Commission. But I have both official and judicial knowledge of the fact that, in very many cases, nearly all the proceedings towards a sale under section 6 were carried through, and the price fixed, and accepted by the vendor, before any originating request was lodged. It had also been a common practice, where a vendor had lodged an originating application, for the purpose of carrying out a sale to the tenants and others, for the vendor and Estates Commissioners to treat the originating application as an originating request, and carry through the sale under section 6. On the other hand, it frequently occurred that, where the vendor had lodged an originating request with a view to a sale under section 6, the originating request had been treated as an originating application and the sale carried through by direct sale to the tenants and others entitled to purchase parcels. Many of the provisions of the Act of 1909 —for example, some of those in section 6, relating to the bonus, and in section 12, relating to substituted agreements—recognize, and are based upon, what I would venture to describe as the informal or irregular proceedings of the Estates Commissioners; and section 42 not only recognizes but legalizes the very method of procedure that was adopted in this and other cases, viz. proposals and negotiations for a sale under section 6, before any application has been made by the owner. No one can have any doubt that

such provisions in the Act of 1909 as I have referred to were inserted at the instance of the Estates Commissioners or others familiar with their practice, in order to provide for such irregular proceedings as I have referred to.

It seems to me that these considerations furnish a clue to the construction of the proviso to sub-section 2 of section 58, which enables me to give effect to every word in it, and so construe it as not to make sub-section 2 inconsistent with sub-section 1. Construing it in this way, I hold that sub-section 2 of section 58 has reference only to the sale of an estate by direct sales to tenants and others entitled to purchase holdings or parcels under the Land Purchase Acts, whether such sales are carried out pursuant to an originating application or request, and that the absolute and general prohibition contained in sub-section 1 stands unaffected by sub-section 2.

I therefore answer the first question in the negative.

The second question put to me is whether, if the sale of this estate is carried out by the Congested Districts Board, a bonus of twelve per cent. will be payable on the purchase-money? This question turns on the proper construction of section 6, sub-sect. 2, of the Act of 1909. The proviso to sub-section 1 provides in effect that a bonus of twelve per cent. will be payable where the agreement for purchase was entered into, or is deemed to have been entered into, on or before the 24th November, 1908; and then sub-sect. 2 provides that "an agreement for the purchase of any estate or land, though not entered into on or before the 24th November, 1908, shall be deemed, for the purposes of this section, to be a purchase agreement entered into on or before that date, where on or before that date the vendor has lodged an originating request in manner provided by rules made under the Act of 1903, with a view to the purchase of the estate or land by the Land Commission under section 6 of that Act or by the Congested Districts Board under section 79 of that Act"; or where certain other alternative conditions have been fulfilled. Now the question is, whether, when an originating request has been lodged with a view to a sale to the Land Commission, and the agreement for purchase is not eventually entered into with the Land Commission but with the Congested Districts Board, such an agreement is

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within sub-section 2? The sub-section does not say with whom the agreement is to be entered into, and the sub-section seems to me to be open to the construction, that, if hereafter agreements for the purchase of an estate under the Land Purchase Acts are entered into, and if, on or before the 24th November, 1908, one or other of certain specified steps had been taken with a view to the sale of that estate under the Land Purchase Acts, then such agreements are, for the purpose of determining the amount of bonus, to be deemed to have been entered into on or before the 24th November, 1908. That being so, and the sub-section being one to preserve existing rights, or rather rights which before the 24th November, 1908, when the specified steps towards the sale had been taken, were expected to flow from the sale, I think the sub-section should, where possible, receive that construction which will most effectually carry out its purpose and meet the justice of the case. And reading this sub-section in the light of sections 57 and 58, already referred to, which have deprived the Land Commission and the Congested Districts Board of their former powers to purchase in certain counties, I think I am entitled to assume that the Legislature, when framing section 6, sub-sect. 2, had in contemplation the future disability of these two bodies in respect of certain sales, and, in order to avoid the injury that might result to vendors in pending cases, owing to the inability of either body to carry out a contemplated sale, framed sub-section 2, so as to apply to the case no matter with whom the agreement for purchase was eventually entered into.

It seems to me also that some light is thrown on sub-section 2 (*a*) by sub-section 2 (*c*). The latter sub-section appears to me clearly to provide that where the Land Judge has, on or before the 24th November, 1908, caused particulars to be furnished *either* to the Land Commission or to the Congested Districts Board, and the estate is eventually sold to either of those bodies, the condition entitling the vendor to a twelve per cent. bonus is complied with.

It is also to be borne in mind that in some cases, prior to the passing of the Act of 1909, the Congested Districts Board bought an estate, where the originating request had been lodged with the Land Commission, and it was thought more advisable

and beneficial to the district that the sale should be to the Congested Districts Board.

On all these grounds I have formed the opinion, and so decide, that if the Congested Districts Board buy this estate, the vendor will be entitled to a twelve per cent. bonus.

This enables me also to decide the third question, viz.: If the Congested Districts Board buy this estate, can they re-sell on a three and a-quarter per cent. purchase annuity? I think it is clear from section 13 (*b*) ii, that in any case where a vendor, on a sale to the Land Commission or Congested Districts Board, is entitled to a twelve per cent. bonus, agreements for re-sale are to be treated as "pending purchase agreements." But it is, I think, equally clear from section 3, sub-sect. 3, and section 13 (*b*), that, though the vendor will, in such a case, be entitled to a twelve per cent. bonus, and though the tenant-purchase annuities will be at three and a quarter per cent., yet, as between the vendor and the Congested Districts Board, the agreement will be a "future purchase agreement," and must be financed accordingly.

Solicitor for the vendor: *W. J. Shannon.*
Solicitor for the Congested Districts Board: *J. O'Connor.*
Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

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1908.

June 24, 25.
July 1, 2, 3,
4, 6, 7, 22.

Appeal.
1909.

Nov. 2, 3, 4,
29.

A. E. COVENEY *v.* H. S. PERSSE, LIMITED, AND SIR ROBERT GARDNER.

(1907. No. 885.)

Limited Company—Debentures—Clauses restricting pledges and mortgages—Sale or pledge—Notice—Ordinary course of business.

1. P. & Co., Limited, pot-still whiskey distillers, issued debentures secured by a trust deed which contained a clause making the debentures a floating charge on the assets and undertaking of the Company, and providing that they should not hinder or prevent the Company from selling, alienating, mortgaging, charging, leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of business, and for the purpose of carrying on the same, but that the Company should not create any mortgage or charge ranking in priority to or *pari passu* with the debenture stock. From time to time the Company disposed of raw pot-still whiskey to one C. The transactions, of which there were six prior to March, 1906, were treated as sales in the Company's books, and C. paid to the Company the full market price for the whiskey. In the case of each lot of whiskey, the Company gave to C. a collateral guarantee in the form of a deed poll, in which the whiskey was referred to as "assigned or pledged," the Company undertaking the burden of custody, storage, and insurance, and the whiskey remaining in the Company's bonded warehouse; but being transferred in the Excise books into C.'s name. The guarantee contained the following words: "we may or will redeem or repurchase the said whiskey in four years at a profit to you of 10 per cent., simple interest on the price paid." It was proved that this pot-still whiskey took four years to mature, and appreciated during the four years 15 per cent. per annum. The Company went into liquidation, and the debenture-holders obtained the appointment of a receiver, who was also appointed liquidator. C. brought an action against the Company and against the receiver and liquidator claiming delivery of the six lots of whiskey which remained in the Company's bonded warehouse, and in the alternative, claiming a declaration that he was entitled to a good and valid pledge, lien, or charge, upon the said whiskey in priority to any claims of the debenture-holders. It was proved at the trial that prior to March, 1906, C. had no notice, actual or constructive, of the debentures, or of the contents of the trust deed.

Held, that the six whiskey transactions were not sales but pledges or mortgages, but that C. being a pledgee or mortgagee for value without notice, was entitled to the declaration which he claimed.

2. In March, 1906, C. received notice of the debentures and of the restrictive clause in the trust deed. Legal advice was taken, and, in view of the doubts which were raised as to the effect of the six previous transactions, an agreement was drawn up in which the Company agreed, *inter alia*, to relinquish their right to redeem the six lots of whiskey.

Held, that whatever the effect of this agreement might be as regards the right of redemption, it did not deprive C. of any rights which he had acquired as against the debenture-holders, by reason of the previous transactions having been for value and without notice.

3. After March, 1906, the Company disposed of two other lots of whiskey to C., accompanied by a new form of guarantee agreement in which the references to pledge and redemption were struck out, and it was made clear that the whiskey was to be the property of C., and that the Company could not insist on a repurchase, but that C. had an option to require the Company to repurchase after the expiration of four years. The agreements were framed under legal advice so as to constitute sales, and transfer the property in the whiskey to C.

Held, that the transactions were not pledges, nor mortgages in disguise; but were sales.

Yorkshire Railway Wagon Co. v. *Maclure* (21 Ch. D. 309) applied.

Held, also, that they were transactions "in the ordinary course of the Company's business" within the meaning of the restrictive clause in the debenture trust deed.

TRIAL OF ACTION.

The statement of claim averred:—

(1) That the plaintiff, on 10th December, 1903, purchased from the defendant Company twenty-nine butts of whiskey, numbered respectively 1778 to 1806, then in the bonded warehouse at Earl's Island, Galway, for the sum of £549 10*s*., less discount for cash, which amounted to £52 6*s*. 8*d*., making a net cash price of £497 3*s*. 4*d*., which was paid by the plaintiff to the defendant Company. Immediately after such purchase the said twenty-nine butts were duly transferred into the plaintiff's name in the said bonded warehouse. One of the said butts was subsequently delivered to the plaintiff, and the remainder are still in bond in the plaintiff's name at Galway.

(2) In the month of January, 1904, the plaintiff purchased from the defendant Company for the sum of £435 1*s*. 2*d*., which was paid by the plaintiff to the said Company, fifty hogsheads of whiskey, numbered 2032 to 2081, then in bond at Galway.

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Immediately after such purchase the said fifty hogsheads were duly transferred into the plaintiff's name in the said bonded warehouse. One of the said hogsheads was subsequently delivered to the plaintiff, and the remainder are still in bond in the plaintiff's name in Galway.

(3) In the month of March, 1904, the plaintiff purchased from the defendant company for the sum of £433 15*s.*, which was paid by the plaintiff to the said Company, twenty-five butts of whiskey, numbered respectively 193 to 217, then in bond in Galway. Immediately after such purchase the said twenty-five butts were duly transferred into the plaintiff's name in the said bonded warehouse. One of the said butts was subsequently delivered to the plaintiff, and the remainder are still in bond in the plaintiff's name at Galway.

(4) In the month of December, 1904, the plaintiff purchased from the defendant Company, for the sum of £998 18*s.* 6*d.*, which was paid by the plaintiff to the said Company, fifty-eight butts of whiskey, numbered respectively 608 to 665, then in bond at Galway. Immediately after such purchase the said fifty-eight butts were duly transferred into the plaintiff's name in the said bonded warehouse. One of the said butts was subsequently delivered to the plaintiff, and the remainder are still in bond in the plaintiff's name at Galway.

(5) In the month of May, 1905, the plaintiff purchased from the defendant Company, for the sum of £390 3*s.* 1*d.*, which was paid by the plaintiff to the said Company, fifty hogsheads of whiskey, numbered respectively 780 to 829, then in bond at Galway. Immediately after such purchase the said fifty hogsheads were duly transferred into the plaintiff's name in the said bonded warehouse. One of the said hogsheads has since been delivered to the plaintiff, and the remainder are still in bond in the said plaintiff's name at Galway.

(6) In the month of December, 1905, the plaintiff purchased from the defendant Company, for the sum of £2387 14*s.* 8*d.*, which was paid by the plaintiffs to the said Company, 227 hogsheads and 14 butts of whiskey, numbered respectively 62 to 139, 140 to 160, 189 to 197, 415 to 429, 433 to 453, 497 to 502, 504 to 547, 579 to 592, and 690 to 723, then in bond at Galway. Immediately after such

purchase the said 227 hogsheads and 14 butts were duly transferred into the plaintiff's name in the said bonded warehouse. Of these, thirty-two hogsheads have since been delivered to the plaintiff or to his order, and the remainder are still in bond in the plaintiff's name at Galway.

(7) On the 7th July, 1906, the plaintiff purchased from the defendant Company, for the sum of £1296 13*s.* 11*d.*, which was paid by the plaintiff to the said Company, eighty-two butts and six hogsheads of whiskey, numbered respectively 752 to 772, 849 to 867, 869 to 903, 954 to 959, and 960 to 966, then in bond at Galway. Immediately after such purchase the said eighty-two butts and six hogsheads were duly transferred into the plaintiff's name in the said bonded warehouse. Of these, two butts and one hogshead were delivered to the plaintiff, and the remainder are still in bond in the plaintiff's name at Galway.

(8) On the 7th July, 1906, the plaintiff purchased from the defendant Company, for the sum of £1203 18*s.*, which was paid by the plaintiff to the said Company, 158 hogsheads of whiskey, numbered respectively 939 to 964, 119 to 237, 293 to 305, then in bond at Galway. Immediately after such purchase the said 158 hogsheads were duly transferred into the plaintiff's name in the said bonded warehouse. Of these, three hogsheads have been delivered to the plaintiff, and the remainder are still in bond in the plaintiff's name at Galway.

(9) In the month of October, 1906, the plaintiff purchased from the defendant company for the sum of £386 17*s.* 11*d.* (which has not yet been paid by the plaintiff to the said company) sixty hogsheads of whiskey numbered respectively 904 to 953, and 1013 to 1052 then in bond at Galway. Immediately after such purchase the said sixty hogsheads were duly transferred into the plaintiff's name in the said bonded warehouse. None of the said hogsheads have been delivered to the plaintiff, and all of them are still in bond in the plaintiff's name at Galway.

(10) By an order of Mr. Justice Barton, dated the 21st November, 1906, made in an action in which Wilfred Fitzgerald is plaintiff and the defendant company is defendant, being an action on behalf of certain mortgage debenture-holders on the property of the defendant company, the defendant Sir Robert

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Gardner was appointed receiver over and manager of the property and assets of the defendant company, and by an order of Mr. Justice Barton, dated the 21st November, 1906, and made on the petition of Wilfred Fitzgerald, it was ordered that the defendant company be compulsorily wound up, and by order dated the 21st November, 1906, the defendant Sir Robert Gardner was appointed liquidator for the purpose of such winding up.

(11) The plaintiff has called upon the defendant Sir Robert Gardner to deliver to the plaintiff or to his order the whiskey mentioned in paragraphs 1 to 9 of this statement of claim, of which the said defendant has assumed the custody, but the defendant has refused and refuses to deliver up to the plaintiff the whiskey so purchased by him as aforesaid or any portion thereof.

(12) The defendant Sir Robert Gardner alleges the transactions aforesaid were in the nature of mortgages or pledges, and not sales, and contends that the security created by such mortgages or pledges is either invalid or puisne to the claims of the holders of the first mortgage debentures of the defendant Company.

(13) The plaintiff, at the date of the transactions stated in paragraphs 1 to 6 of this statement of claim, had no knowledge or notice of the existence of such debentures.

The plaintiff claimed—(1) the delivery of the whiskey mentioned in paragraphs 1 to 9; (2) damages for detention of the said whiskey; (3) alternatively a declaration that notwithstanding the existence of the said debentures, or any of them, the plaintiff was entitled to a good and valid pledge, lien, or charge of and upon the said whiskey mentioned in paragraphs 1 to 9, inclusive, in respect to all moneys then due or owing to the plaintiff upon the security of any such pledge, lien, or charge, and in priority to every and any claim of the said debenture-holders or any of them, to or upon the said whiskey or any part thereof; (4) an account and inquiry of what moneys were due to the plaintiff in respect of advances made upon the security of such pledge, lien, or charge, if any, to the plaintiff by the defendant company; (5) a sale of the said whiskey or a competent part thereof to discharge the sum found to be due to the plaintiff upon the taking of the accounts and making of the inquiries aforesaid.

The defence was as follows:—(1) The defendants deny that

the plaintiff purchased from the defendant Company the whiskey mentioned in paragraphs 1 to 9 of the statement of claim, or any part thereof, for the prices therein respectively mentioned or at all, or that the said whiskey, or any part thereof, was transferred into the plaintiff's name. (2) Each of the transactions referred to in paragraphs 1 to 9 of the statement of claim, and therein falsely alleged to have been a sale, was in reality a mortgage of whiskey to secure to the plaintiff moneys advanced by him to the defendant Company and interest thereon, and each of the parcels of whiskey described in the said paragraphs respectively was transferred into the plaintiff's name in the said bonded warehouse for the sole purpose of completing the plaintiff's title to the same as mortgagee. (3) The whiskey stated in paragraphs 1 to 8 of the statement of claim to have been delivered to the plaintiff, or to his order, was delivered out of the said bonded warehouse, and was sold by the plaintiff, and the proceeds of the sale thereof were, or should have been, applied by the plaintiff in reduction of the said advances and payment of interest thereon. (4) The defendants do not admit that any sum remains due to the plaintiff on foot of the said mortgages, or any of them, either for principal or interest. (5) The defendant Company, in pursuance and under the powers of their articles of association, issued three separate series of debentures, viz., £100,000 4 per cent. first mortgage debentures, secured by a trust deed, dated the 24th February, 1896, and made between the defendant Company of the first part, Henry Sadlier Persse of the second part, and the City Safe Deposit and Agency Co., Limited, of the third part, and £30,000 5½ per cent. second mortgage debentures, secured by a trust deed, dated the 13th May, 1901, and made between the defendant Company of the one part, and the said City Safe Deposit and Agency Co., Limited, of the other part, and £20,000 5½ per cent. mortgage debentures, secured by a trust deed, dated the 25th April, 1905, and made between the same parties, and ranking equally with the said second mortgage debentures. (6) The said several trust deeds provided that the assets and undertaking of the defendant Company (other than the freehold hereditaments and uncalled capital therein-mentioned) should stand charged with the payment to the said City Safe Deposit and

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Agency Co., Limited, of the principal moneys and interest secured by the said debentures, and that such charge should be a floating security, and accordingly should in no way hinder or prevent the defendant Company from selling, alienating, mortgaging, charging, leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of its business, and for the purpose of carrying on the same; but that the defendant Company should not be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with the said debentures or trust deeds. (7) The said £100,000 4 per cent. first mortgage debentures, and £30,000 5½ per cent. second mortgage debentures were issued, and the said trust deeds of 24th February, 1896, and 15th May, 1901, were executed a long time prior to any of the said transactions between the plaintiff and the defendant Company, and the said £20,000 5½ per cent. mortgage debentures, ranking equally with the said second mortgage debentures, were issued, and the said trust deed of 25th April, 1905, was executed prior to any of the said transactions which are referred to in paragraphs 5 to 9 of the statement of claim. The defendant Sir Robert Gardner, as receiver and manager for the said debenture-holders, says that at the time of each of the said transactions mentioned in paragraphs 1 to 4 of the statement of claim, the plaintiff had notice and knowledge of the said £100,000 first mortgage debentures, and £30,000 second mortgage debentures, and said trust deeds of the 24th February, 1896, and 13th May, 1901, and at the time of each of the said transactions mentioned in paragraphs 5 to 9 of the statement of claim the plaintiff had notice and knowledge of the aforesaid debentures and trust deeds, and also of the said £20,000 mortgage debentures, ranking equally with the said second mortgage debentures, and of said trust deed of 25th April, 1905.

(8) The original agreements under which the said transactions mentioned in paragraphs 1 to 6 of the statement of claim were effected were in the nature of mortgages; but in or about the month of July, 1906, other agreements, purporting to be on their face agreements for the sale of the said whiskey, were, at the plaintiff's instance, and in consequence (as the defendants believe) of the decision of His Majesty's Court of Appeal in Ireland, and

the Hon. Mr. Justice Barton in *Cox* v. *Dublin City Distillery Co.* (1), prepared and substituted for the said original agreements. There was no consideration whatsoever for the said substituted agreements, and the same were procured by the plaintiff for the purpose of making it appear contrary to the fact that the said transactions, which were in reality mortgages, were absolute sales of the said whiskey, and at the times of the making of the said substituted agreements the plaintiff had notice and knowledge of all the debentures issued, and trust deeds hereinbefore referred to.

(9) All the said debentures issued as aforesaid are still outstanding, and the said trust deeds are still of full force and effect; and the defendant Sir Robert Gardner, as such receiver and manager as aforesaid, contends and will submit that the said several transactions between the plaintiff and defendant Company, in reference to the said whiskey, constitute and are in their nature and substance mortgages, and consequently cannot rank in priority to or *pari passu* with the said debentures or trust deeds, or entitle the plaintiffs to the said whiskey, or any part thereof, until the said debenture-holders are fully paid off, and that all the said whiskey now standing in the name of the plaintiff is held by him as a trustee for the said City Safe Deposit and Agency Co., Ltd., and the defendant Sir Robert Gardner, the trustees and receiver respectively for the holders of the aforesaid debentures.

(10) The defendant Sir Robert Gardner further says that, admitting for the purposes of this paragraph, but not further or otherwise, that the transactions were sales, the said sales were not sales in the ordinary course of the business of the defendant Company, or sales for the purpose of carrying on the said business, within the meaning of the said trust deeds, and that the plaintiff having had notice and knowledge as aforesaid of the said trust deeds and debentures has no title to the said whiskey as against the said City Safe Deposit and Agency Co., Limited, and the defendant Sir Robert Gardner, the trustees and receiver, respectively, for the holders of the aforesaid debentures.

(11) The defendants deny that any of the said whiskey is the goods or property of the plaintiff.

(1) [1906] 1 I. R. 446.

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(12) The defendants deny that the plaintiff has suffered any damage by reason of any of the matters complained of.

It appeared from the evidence of plaintiff and his witnesses that the plaintiff Albert Ephraim Coveney of Birkenhead had been for nearly forty years Manager of the Wine and Spirit Department of the Birkenhead Brewery Company. He claimed delivery from the defendant Company and from Sir Robert Gardner, as liquidator of the Company, and receiver for the debenture-holders, of the nine lots of whiskey mentioned in the statement of claim. These lots of whiskey were at the date of the trial all lying in the bonded warehouse of the defendant Company at Galway. He claimed them as goods sold; and in the alternative as being the subject of valid pledges or charges for all moneys due on the security of these lots.

The debenture-holders relied upon clause 5 of the debenture trust deed, which was as follows:—

"The assets and undertaking of the Company (other than the said freehold hereditaments and uncalled capital) shall stand charged with payment to the trustees of the principal moneys and interest secured by the debentures, and all other moneys intended to be hereby secured, and such charge shall be a floating security, and accordingly shall in no way hinder or prevent the Company from selling, alienating, mortgaging, charging, leasing, paying dividends out of profits, or otherwise disposing of, or dealing with, such assets in the ordinary course of its business, and for the purpose of carrying on the same; but the Company shall not be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with the debentures or these presents."

There was no dispute about lot 9, which had been an unqualified sale on credit without any collateral agreement. As regards lots 1 to 8, plaintiff had paid £7000 in respect of them, which was their full market value. The debenture-holders challenged these transactions upon the ground that in respect of each of them there was a collateral guarantee embodied in a deed poll executed by the Company, giving rights of repurchase or redemption at

the end of four years, and providing for bonding in the meantime. It was contended on behalf of the defendants that, in view of the terms of this collateral guarantee and of the other relevant circumstances, the transactions were not sales but loans by way of mortgage or pledge, and as such could not rank in priority to or *pari passu* with the debenture stock.

Lots 1 to 6 stood on a different footing from lots 7 and 8. Lots 1 to 6 were disposed of to plaintiff before March, 1906. Prior to March, 1906, plaintiff alleged he had no notice actual or constructive of the existence of the debentures or of the contents of the debenture trust deed. In March, 1906, plaintiff admittedly received notice of the debentures and of the restrictive clause in the trust deed.

The following is the form of collateral guarantee which accompanied the six transactions mentioned in paragraphs 1 to 6 of the statement of claim:—

"Referring to the — butts and — hogsheads of whiskey... now lying in our duty-free warehouse, Earl's Island, and New Docks, Galway, and which on the date of this agreement are assigned or pledged to you, for the sum of £ —— paid by you to us, delivery warrants therefor in favour of you and your assigns being handed to you, and the said casks of whiskey having been transferred into your name in our Distillery books, and hereafter held by the Distillery as warehousemen for you and on your account, it is hereby agreed for the consideration aforesaid and herein that we guarantee safe custody, storage free, of the said whiskey, and that the same is and will continue to be insured against fire, and that we may and will redeem or repurchase the said whiskey in four years at a profit to you of 10 per cent. per annum simple interest on the sum of £ ——. In case of fire, leakage in bond, accidents, or otherwise in the meantime and during the continuance of this agreement, we will make good all loss thereby caused up to the above sum with accrued interest to the date of such loss."

The Company's books and minutes, and the correspondence between the parties, were put in evidence. It appeared that all

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these transactions had been dealt with as sales in the Company's books; that the Company had insisted that they were sales when income tax was claimed in respect of them, and when the auditor drew attention to them; and that when in May, 1904, they had what was admittedly a loan transaction with plaintiff, it was dealt with as a loan in the books. On the other hand, in plaintiff's letters, the transactions were frequently referred to as "investments," and there were letters in 1901, in which plaintiff discussed the question, whether it would be most advantageous for him to carry out the transaction in the form of a loan or sale.

In March, 1906, the plaintiff received notice of the debenture and of the restrictive clause in the debenture trust deed, and became aware of a judicial decision affecting the validity of such securities as he held. A correspondence between plaintiff and the Company was put in evidence, from which it appeared that the Company, while adhering to the view that the previous transactions had been sales, were advised that the question would be raised whether they were really mortgages or pledges, and that the parties were advised to adopt a new form of guarantee, and to substitute a modified form of guarantee for the old guarantee in respect of the transactions which were then running. The words "pledged" and "redeem" were struck out; and the substituted agreement contained an acknowledgment by the Company that the lots of whiskey already in bond in plaintiff's name had been sold to plaintiff, and was accompanied by a schedule of particulars and by receipts, in which the Company acknowledged the receipt of all the purchase-money. The new agreement purported to operate as regards the date of repurchase from the date of the old transaction. It did not purport to cancel the old transactions, but to cancel the old collateral guarantees and substitute a new one. The substituted agreement applied to transactions 1 to 6 mentioned in the statement of claim.

As regards the two transactions mentioned in paragraphs 7 and 8 of the statement of claim, they were carried out in July, 1906, and were accompanied by a new form of guarantee, in which the references to pledge and redemption were struck out, and every care taken to insert nothing inconsistent with the

transactions being out-and-out sales. The following was the form of the new guarantee of July, 1906 :—" We hereby acknowledge to have sold to you and stored for you, in our duty-free warehouse (first-class station, New Docks, Galway), the whiskey of which full particulars are set forth in the schedule hereto, for the sum of £ —— paid by you to us. Delivery warrants for such whiskey in favour of you and your assigns having been duly handed to you, and the said whiskey transferred into your name in our distillery books, we, undertaking to hold the same hereafter as warehousemen for you, and on your account. In consideration of the sales aforesaid, we agree to guarantee the safe custody (storage free) of the said whiskey, and undertake that it will be and continue during storage (as above) insured against fire, and we are to make good to you any loss by fire (not covered by insurance), leakage in bond, accident or otherwise, to the extent of the sum of £ ——, with the accrued interest at the rate of 10 per cent. per annum to the date of such loss. We further agree, if so required by you at any time or times after the expiration of —— years from the date of payments as stated in the said schedule, to repurchase from you such parcel or parcels of the said whiskey as you may desire to sell back to us, at a profit to you of 10 per cent. per annum on the invoiced price thereof."

There was evidence to the effect that it took five years for pot-still whiskey to mature, and that it appreciated 15 per cent. per annum during that period; and that these sales or pledges, with collateral guarantees, were a class of transaction usual with Scottish pot-still distillers and not unusual with Irish pot-still distillers. The trust deed contained a clause giving the debenture-holders a right to have a representative upon the board of directors. They selected as their representative a local gentleman in Galway who was aware of, and was a party to, all these transactions.

The other relevant facts are stated in the judgment of Barton, J.

Ronan, K.C., *Matheson, K.C.*, *Fitz Gibbon, K.C.*, and *A. Matheson*, for the plaintiffs :—

As regards the six transactions carried out before March, 1906, we say that they were out-and-out sales. There may be a sale

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with a proviso for repurchase, and such a sale is not less a sale because the parties make it clear that they intend to avail themselves of the proviso. If there had been any breach of the collateral agreements, the remedies of the parties would not have been the equitable remedies of pledger or pledgee, or mortgagor or mortgagee. Pledgees and mortgagees are not in the habit of advancing the full price of the pledged or mortgaged article. In face of the entries in the Company's books, plaintiff would have been treated as a purchaser from them if they had brought proceedings against him on that basis. If the transactions were pledges or mortgages, we say that the plaintiff had no notice of the debentures or of the contents of the trust deed, prior to March, 1906, and that he is a *bona fide* pledgee or mortgagee for value without notice. The law as to constructive notice of dealings with land does not apply to commercial transactions such as these: *Manchester Trust* v. *Furness* (1); *English and Scottish Mercantile Investment Co.* v. *Brunton* (2). If the transactions were for value without notice, the agreement which was substituted for the previous six agreements would not prejudice the plaintiff's right. As regards transactions 7 and 8, they were out-and-out sales in the ordinary course of the Company's business, and were not affected by the restrictive clause in the trust deed. Transaction 9 was an ordinary transaction of sale on credit, and we are entitled to delivery upon payment.

Serjeant O'Connor, K.C., *Gordon, K.C.*, and *W. G. Gibson*, for the defendants.

The transactions prior to March, 1906, were mere pledges or mortgages; and plaintiff had notice of the debentures. There are passages in the correspondence which show that he wilfully shut his eyes; and notice should be imputed to him. He made no inquiry, and he is affected by the knowledge which he would have had if he had inquired and got a true answer: *Agra Bank* v. *Barry* (3). The transactions after March, 1906, were mere loans in disguise,

(1) [1895] 2 Q. B. 539. (2) [1892] 2 Q. B. 70.
(3) L. R. 7 H. L. 135.

and were not in the ordinary course of business. We admit that transaction 9 was a sale on credit, but the other transactions cannot take priority of the debenture-holders.

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BARTON, J.—

[After referring to the pleadings, and the provisions of the trust deed, and the course of the trial, proceeded]:—

Under these circumstances there are five questions in dispute. Firstly, had the plaintiff when he entered into transactions 1 to 6, which were all prior to March, 1906, actual or constructive notice of the contents of the debenture trust deed? Secondly, were transactions 1 to 6 sales, or were they loan transactions? Thirdly, were plaintiff's rights (if any), as regards lots 1 to 6, abrogated or cancelled by what occurred in connexion with the modification of the Company's guarantee in July, 1906? Fourthly, were the transactions 7 and 8, which were entered into in July, 1906, loan transactions in disguise? Fifthly, if not loan transactions in disguise, were they dealings in the ordinary course of the Company's business, and for the purpose of carrying on the same?

I shall deal, in the first instance, with the question of notice. Both as regards the merits and as regards the legal bearings of the case it is of special importance.

[His Lordship then discussed the evidence and correspondence as to notice, and found that plaintiff had no actual notice of the debentures, or of the contents of the trust deed, and that he paid the full market price of the whiskey *bona fide*, without notice of the defendants' security. He then proceeded as follows]:—

It was not seriously argued that the mere knowledge that Persse's Distillery was converted into a Limited Company carried with it constructive notice of the debentures and of their contents. It appears, however, from the correspondence that this view was present to the mind of some of the parties in 1906; and I must not leave it unnoticed. In commercial, as in other transactions, notice or knowledge will be attributed to a person when he "wilfully shuts his eyes" or "puts aside suspicion." On the other hand, frequent protests have been made by eminent Judges against the extension in all its fulness of the equitable doctrine of

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constructive notice to commercial transactions; *e.g.*, in *Manchester Trust* v. *Furness* (1), by Lindley, L.J., at pages 545 and 546; in *English and Scottish Mercantile Investment Co.* v. *Brunton* (2), by Lord Esher, at page 711, and Bowen, L.J., at p. 715; *In re Valletort Sanitary Steam Laundry, Limited* (3), by Swinfen Eady, J., and elsewhere. The evidence does not afford any ground for saying that the plaintiff "wilfully shut his eyes"; and I have no difficulty in coming to the conclusion that the plaintiff had no notice, actual or constructive, of the debentures, or of the contents of the trust deed.

In consequence of this finding, the question of sale or loan becomes of secondary importance; but I cannot pass it by.

In the defendant Company's books, these transactions were undoubtedly treated as sales in every book and account, from the day-book to the balance-sheet. The goods were in each case taken out of the Company's stock, and treated as no longer an asset, but as if the property in them had passed to plaintiff. I find no deviation from that attitude. It is not merely a question of entries in the books and accounts. When income tax was claimed, Persse & Co. made the point that these were sales. When the auditor raised the question whether these transactions should be entered in the minutes, Persse & Co. insisted upon these transactions being treated as ordinary trade sales. From first to last, and at every stage, Persse & Co. took up and adhered to this position. The prices were admittedly the market price or thereabouts. These entries in the books were no mere formalities. When Coveney in May, 1904, unquestionably made a loan to the Company, and took whiskey as a security, there was no pretence of a sale. The matter was treated as a loan upon the security of the whiskey. The whiskey was transferred into plaintiff's name in the Excise books, but the transaction did not purport to be and was not treated as a sale in any shape or form.

As regards the plaintiff's view of the transaction, I do not think it was by any means so precise. There are passages in the early correspondence in 1901 which suggest that plaintiff was in doubt whether a transaction in the form of sale or loan would be

(1) [1895] 2 Q. B. 539. (2) [1892] 2 Q. B. 70.
(3) [1903] 2 Ch. 654.

the most advantageous for him. Then we have a large number of letters from him to Persse, Limited, reminding them that the transactions were merely "investments" to be repurchased at the end of the four years. I am sure that plaintiff is *bona fide* in saying that he believed these transactions to have been sales. But there are grounds for inferring that he intended them to operate in a way which the law would regard as a mere security for a loan.

The collateral guarantee referred to the whiskey as "assigned or pledged," thus raising on its face a doubt as to the meaning of the transaction. I do not think that any conclusive inference can be drawn from the circumstance that the Company took the burden of custody, storage, and insurance. That burden might be part of the consideration, without which the price would be greater, and might be an appropriate arrangement when the goods were left to mature in the Company's bonded warehouse. The transfer of name in the Excise books is a neutral element, being applicable to sale or security. Then come the words so much relied upon: "We may or will redeem or repurchase the said whiskey in four years at a profit to you of 10 per cent. simple interest on the price paid." I am not much impressed by the arguments founded on the use of the words "profit" and "interest." Interest may be paid on the price of sales, *e.g.*, where credit is given—and the words do not seem to me to help us much. But the words "redeem or repurchase" suggest for the second time on the face of the instrument a doubt whether it was intended to operate as a sale or as a security. Besides the words "we may or will" (when accepted and acted on by plaintiff) created, I think, a mutual obligation for redemption or repurchase, which is a powerful circumstance in aid of the view that the transaction was intended to operate merely as a security. I cannot doubt that the obligation to redeem or repurchase was mutual. Plaintiff put that construction on the agreement in a letter of February 28th, 1905; and this construction of the instrument does not appear to have been disputed at that time by Persse and Co. I am also impressed by the letters in which Mr. Coveney so frequently insisted that the transactions were only "investments pure and simple" to be repurchased by the Company. There was great force in Mr. FitzGibbon's

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argument upon this branch of the case; and it is not without hesitation that I have come to the conclusion that these transfers of whiskey were, as between plaintiff and the Company, "intended to operate as" security for a four years' investment. I use the words "intended to operate as," which are the apt words to be found in section 61 (4) of the Sale of Goods Act, 1893. It is not very material whether the transaction be regarded as pledge or mortgage. I prefer to regard them as pledges rather than as mortgages. The whiskey was deposited in the plaintiff's name, and the entire of it, and the property in it, was vested in him so far as was necessary to secure the performance of the Company's obligation? The plaintiff was, in my opinion, a pledgee for value without notice, and as such was entitled to take priority of the debenture-holders.

I now come to the third question, whether what occurred on July 3rd, 1906, altered plaintiff's position. In March, 1906, he had notice of the debentures and he was informed of a judicial decision which raised a serious question as to the validity of his security. There ensued a correspondence between plaintiff and the Company such as might be expected under the circumstances. The letters are all in evidence, and we can see what was passing. The Company took up the position that they had always treated and regarded the transactions as sales, but they feared that the words "pledged" and "redeemed" in the guarantee agreements might give rise to the opposite contention. Advice was taken, and a new form of guarantee agreement was adopted for future transactions, and, on the assumption that the previous transactions had been sales, the parties substituted for the old guarantee a modified form of guarantee as regards the transactions which were then running, containing, *inter alia*, an acknowledgment that these transactions were sales. In my opinion this modified guarantee and acknowledgment of a sale makes no difference in the present action. If the previous transactions were sales, they stand confirmed and acknowledged as such. If, upon their true legal construction, they were pledges, the mistaken acknowledgment that they were sales would not deprive the plaintiff of his rights as pledgee for value without notice.

As regards the two transactions after July, 1906, I see no

ground for impeaching them. The main grounds upon which I hold the former transactions to have been securities rather than sales were that the collateral guarantees involved a mutuality of obligations for redemption, and that the use of the words "pledge" and "redeemed" (explained by the mutual understanding that the transactions were investments to be repurchased by the Company) gave to the transactions the character of a pledge. The new guarantee excluded and negatived these elements. The references to pledge and redemption were struck out; and, instead of the transactions being treated as mere investments, it was made clear that the whiskey was to be the property of the plaintiff to do what he liked with, and that he was under no obligation whatever that would restrain him from dealing with it as the out-and-out owner of the stuff. Counsel for defendant said that the new transactions were loans in disguise. That is exactly what was contended in the *Yorkshire Railway Wagon Co.* v. *Maclure* (1), where the Wagon Company under advice altered a proposed loan transaction into a sale and repurchase on account of a doubt as to their power to carry out the transaction by loan. The Court held that no illegality or evasion was intended. On the contrary, what was intended was to do what was legal instead of what might be illegal. The same reasoning applies here, and these subsequent transactions are in my opinion unimpeachable. They were sales or at all events agreements transferring the property—not mortgages or pledges.

There remains the question whether these transactions were "in the ordinary course of the Company's business, and for the purpose of carrying on the same." These expressions are relative ones—relative to the trade in question and to the particular Company in question. This kind of transaction, whether it be regarded as a pledge or a sale or a contract transferring the property, was in use between Mr. Persse and his customers before his business was converted into a Limited Company. The articles of Association expressly conferred upon the Company power to make conditional sales; and this way of doing business was confirmed and continued by the Directors of the Company

(1) 21 Ch. D. 309.

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immediately after the foundation of the Company. The debenture-holders had, under a provision in their trust deed, an official representative on the Board, who knew of and sanctioned these transactions, which formed a not inconsiderable part of the Company's business. This kind of transaction is sworn to be usual with Scottish pot-still distillers, and not unusual with Irish pot-still distillers. It seems to be not inappropriate to the pot-still trade, in which the whiskey takes four years to mature, and is not fit for use for four years. Mr. Persse said that during four years the pot-still whiskey appreciates 15 per cent. per annum, *i.e.* 60 per cent. at the end of that period. He was not contradicted upon this point. It may not suit a distiller to sell all his whiskey raw, or to keep it all until it matures. It does not seem unreasonable that the Company should, within reasonable limit, make alternative arrangements by which they should get the market price of the new whiskey at once, with some prospect or chance of sharing part of the ultimate profit. It does not seem unreasonable that a purchaser who pays the market price for an article out of which he can make no profit for four years, should expect as an inducement some guarantee against being overstocked with whiskey at the end of that period; or that a man who is to receive no interest during four years should expect a larger than the ordinary profit if he has to wait to the end of that period before he can get any profit at all. At all events the evidence is that the practice was usual in this and other pot-still distilleries. It was carried on without concealment. It has hardly been suggested that the circumstance that these transactions arose out of previous obligations of the Company is material upon this issue. It is not outside the ordinary course of a Company's business to discharge its just obligations. In my opinion, these were transactions in the ordinary course of this particular Company's business and for the purpose of carrying on the same. I say "this particular Company's business"—I am not laying down any general proposition, but merely dealing with the special facts and circumstances and history of this case.

The plaintiff is, in my opinion, entitled to succeed in this action—as regards transactions 1 to 6, as a full pledgee or mortgagee for value without notice; as regards transactions 7 and

8, upon the ground that they were sales in the ordinary course of the Company's business. As regards transaction 9, he will be entitled to delivery upon payment of the price. It was an ordinary sale on credit in respect of which no question arises.

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W. M'G.

The defendants appealed (1).

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Serjeant O'Connor, K.C., Gordon, K.C., and *W. G. Gibson*, for the appellant.

Nov. 2, 3, 4, 29.

Ronan, K. C., Matheson, K. C., Fitz Gibbon, K.C., and *A. Matheson*, for the respondent.

PALLES, C.B.:—

Nov. 29.

The Lord Chancellor has read my judgment, in which he concurs.

I am of opinion that the judgment appealed from should be affirmed.

In the view which I take of the case, it will be sufficient to the determination of the appeal to decide three of the many questions which have been argued, viz.:—

(1) Whether the plaintiff had notice of the debentures prior to the 1st January, 1906.

(2) Whether the transactions after that date were sales or pledges.

(3) Whether the agreement of the 3rd July, 1906, entered into after notice of the debentures, injuriously affected the position in which the plaintiff would have been had that agreement not been entered into.

The first question—that of notice to the plaintiff of the debentures—is one of weight of evidence, and when fully considered, in my mind, involves only two considerations: first, the adequacy of the affirmative evidence of notice, the onus of which lies on the defendants; and secondly, the credit to be attached to the testimony of the plaintiff. [His Lordship then dealt in detail with

(1) Before THE LORD CHANCELLOR, PALLES, C.B., and HOLMES, L.J.

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the evidence and correspondence, and came to the conclusion that the plaintiff did not, before March, 1906, receive actual notice of the debentures or of the contents of the trust deeds; and then proceeded.]

I now come to the transactions which took place after March, 1906, when the plaintiff had admittedly received a copy of the debentures. As to these, I have, in the first place, to say that I see no reason to come to the conclusion that these transactions were not, in honesty and reality, such as the documents represent them to be. The plaintiff had been in the habit of advancing money on transactions which the law considered pledges. He became aware of the debentures which prohibited such pledges. He was, doubtless, advised that if there were a change in the nature of the transaction, if a sale were substituted for a pledge, the transaction would be valid; and I hold, not that the form only of the transaction was changed, its substance remaining the same—but that the substance was changed, that the real transaction was that which was represented by the documents—I see no more reason to impute any fraud or any difference between the real transaction and the document than there was in the *Yorkshire Railway Wagon Co.* v. *Maclure* (1), and upon the construction of those documents I hold that the real transactions were sales, not loans: *Goodman* v. *Grierson* (2); *Williams* v. *Owen* (3). The parties must have expressly bargained that the Company should not be entitled to the right to redeem which was given by the former documents. The money was advanced upon the faith of the abandonment of that right. The presence or absence of reciprocal rights is the determining element in ascertaining whether the document evidences a sale or a pledge. It is too much to ask us to hold that in an honest commercial transaction, in which the parties were at arms' length, the stipulation upon which, to their knowledge, the validity of the transaction depended is to be abrogated with the view of avoiding the transaction.

As to the last matter, the agreement of the 3rd July, 1906, had the question been whether the defendants were entitled to redeem, I should probably have held that the position of the debenture-

(1) 21 Ch. D. 309. (2) 2 Ba. & B. 274–9. (3) 5 Myl. & Cr. 303.

holders ought not to be prejudiced by that agreement, and that, therefore, they should be let in to redeem. That, too, appears to have been the opinion of Barton, J., and the decree is framed on that basis; but I am clearly of opinion that that agreement by the Company to relinquish its right to redeem cannot deprive the plaintiff of the rights which he had acquired by the previous pledges having been without notice of the debentures. The *Bushmills Case*, in which all the authorities to that time were carefully considered, and which is binding on this Court, shows that the later transactions were "in the ordinary course of the Company's business." Upon this question I shall not enlarge, as I am prepared to adopt all that has been said by Barton, J., in reference to it.

Upon the whole, then, I agree in the entire of the judgment of Barton, J., and am of opinion that the appeal should be dismissed with costs.

HOLMES, L.J.:—

This action was brought to enforce the delivery by the defendant Company, now in liquidation, and by Sir Robert Gardner, the liquidator, of nine parcels of whiskey, said to have been purchased by the plaintiff on nine different occasions.

The first of the transactions, alleged to have been purchases, took place in December, 1903; the five following at various dates in 1904 and 1905, the seventh and eighth in July, 1906, and the ninth in the following October. As to the last, Barton, J., was of opinion that there was no controversy. It has not been referred to in this Court, and, therefore, so much of the judgment appealed from as orders the delivery to the plaintiff of the whiskey to which that transaction relates, upon his paying to the defendants the sum of £386 17*s.* 11*d.*, is to stand. The transactions relating to the other eight parcels have the following facts in common. In each of them the parcel of whiskey dealt with was lying in the bonded warehouse, Earl's Island, Galway; a sum of money, said to be the selling price of the whiskey, was paid by the plaintiff to the defendant Company; the whiskey was transferred into the plaintiff's name in the warehouse where it still is; it was entered as a sale in

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the records of the defendant Company; the sum paid was included in their profit and loss account; and a collateral guarantee or contract was given under their seal. These documents are the foundations of the defendants' case, and the first six of them are practically identical. They all describe the whiskey as assigned or pledged to the plaintiff for the sum paid by him, and agree that the Company will guarantee safe custody and storage free thereof, and may and will redeem or repurchase it in four or sometimes in three years at a profit of 10 per cent. per annum, simple interest, on the amount paid. It is argued from the provisions of this contract that the transactions were not sales, but mortgages or pledges, and that the security created thereby is either invalid or puisne to the claims of the holders of certain mortgage debentures of the defendant Company. In support of this contention reliance is placed on the form of the debentures, and the provision of the trust deeds to secure the payment thereof.

In 1896, the business of whiskey-distilling previously carried on in Galway by a private partnership was transferred to a Limited Company then formed for the purpose of carrying on the same trade; and subsequently under the Articles of Association there were issued three series of debentures—£100,000 4 per cent. A, secured by a trust deed of the 24th February, 1896; £30,000 5½ per cent. B, secured by a deed of the 13th May, 1901; and £20,000 5½ per cent. B, similarly secured by a deed of the 25th April, 1905.

The first of these deeds contained the following stipulation, which is substantially repeated in the other two:—"The assets and undertaking of the Company (other than the freehold hereditaments and uncalled capital) shall stand charged with payment to the trustees of the principal moneys and interest secured by the debentures and all other moneys intended to be hereby secured, and such charge shall be a floating security, and accordingly shall in no way hinder or prevent the Company from selling, alienating, mortgaging, charging, leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of its business, and for the purpose of carrying on the same, but the Company shall not be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with the debentures or these presents."

There can be no doubt as to the effect of this provision. It does not forbid the Company from mortgaging or pledging its assets in the ordinary course of its business, and for the purposes of carrying on the same, but it prescribes that any such mortgage or pledge, if made, shall not rank in priority to or *pari passu* with the debentures.

Therefore, the first question to be considered is, whether the six transactions with which I am dealing were mortgages, and I give an affirmative answer thereto for the reason succinctly stated by Mr. Justice Barton, that the obligation to redeem or repurchase to be found in the guarantee was mutual. I do not doubt that the defendant Company regarded them as sales. Their books deal with them as such, and other matters, such as their refusal to pay income tax, show that they always adhered to this position. The view of the plaintiff is more uncertain, but I attach little or no importance to the belief or even to the intention of the parties. The debenture-holders are entitled to claim that the character of the dealing must be determined by the true construction of the written contract entered into for the purpose of defining the rights of the plaintiff on the one hand, and of the Company on the other. That document shows that the Company, having received from the plaintiff a sum of money, assigned to him certain specified butts of whiskey on the terms that the latter should retain the same for four years, and that during such period he should be paid interest at a rate mentioned on the sum advanced, and at the termination thereof should be repaid such sum, whereupon he was to return the whiskey.

A mortgage may be described as a loan the repayment of which, with interest, at a fixed time, is secured by the borrower assigning property to the lender; and the six transactions under consideration were essentially of this character. No doubt the term "mortgage" is generally applied to loans in which the security consists of real estate or chattels real, and this probably led Mr. Justice Barton to regard the dealings as pledges rather than mortgages, but this is merely a verbal distinction, implying no real difference.

Up to this point I accept the view presented by the defendants; but the serious controversy in this branch of the case is,

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whether the plaintiff had notice of the contents of the debentures or even of their existence. [His Lordship then dealt with the question of notice, and found that the plaintiff had, prior to March, 1906, no notice of the debentures or of the trust deed. His Lordship then proceeded.]

I am thus relieved from considering whether the mere knowledge that the Company had increased its capital by the issue of debentures would amount to constructive notice of the provisions of those instruments and of the trust deed by which they were secured. I may, however, say that while it might be reasonable to infer from such knowledge notice that the debentures were a first charge on the uncalled capital of the Company, and on the premises in which the business is carried on, it would be somewhat startling for a Court to hold that such knowledge would amount to constructive notice of provisions calculated to prejudice the customers of a commercial or manufacturing Company in their dealings with it in the ordinary course of its business. Having thus disposed of the questions that arise in connexion with the first six transactions, I now come to the seventh and eighth, entered into on the 7th July, 1906.

The plaintiff, having read the copy of the debentures sent to him, saw that it might be held that the guarantees theretofore in use were, in their legal construction, mortgages or charges within the meaning of the provision that prohibits the Company from making any mortgage or charge ranking in priority to or *pari passu* with the debentures, and was of opinion that it would be desirable to alter the terms of the guarantee. This, after much consideration, was done, and the new form was used in the two transactions of the 7th July, 1906. In each of these cases there is a memorandum of that date showing an apparently unconditional sale, but each is followed by an agreement relating thereto in which the defendant Company, after acknowledgment of the sale, agrees, if so required by the purchaser at any time or times after the expiration of four years, to repurchase so much of the whiskey as he may desire at a profit of 10 per cent. per annum on the invoiced price thereof. There can, I think, be no doubt that this is an essentially different contract from that which governed the six previous transactions. The purchaser had there-

under a complete control over the whiskey, and could sell it at any time. If he desired to keep it unsold for four years, he might thereafter call on the Company to repurchase it at a profit of 10 per cent. on the price paid, but he was under no obligation to do so. I have pointed out the reasons which have led me to the conclusion that the first six transactions have the legal incidents of mortgages. Those reasons are wholly inapplicable to the new form of agreement. It was hinted rather than argued that the plaintiff had no right to change the character of his dealings with the Company to the prejudice of the debenture-holders. I am of opinion that he could not, without consideration, convert the previous mortgages into sales by altering the guarantees that related to them, and that therefore he did not improve his position by obtaining in the case of the past transactions agreements in the new form in substitution for the contemporaneous documents. But there is nothing illegal in a person who had advanced money on an invalid or defective security to require in subsequent dealings with the same person a security free from the like infirmity. I am therefore satisfied that the provisions of the trust deeds that give debenture-holders priority over mortgages do not apply to these two transactions which, in my opinion, were conditional sales.

There only remains the question whether these sales were in the ordinary course of the Company's business and for the purpose of carrying on the same. I am glad to say that it is unnecessary for me to deal with this branch of the case, as I adopt in relation thereto the reasoning of Mr. Justice Barton, to which it would be superfluous for me to add a word.

Solicitors for the plaintiff: *F. Sutton & Co.*

Solicitors for the defendants: *D. & T. Fitzgerald.*

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R. ST. J. C.

Barton, J.
1909.

Jan. 28.
Feb. 4, 5, 11, 12.
May 18.

EARL OF BANDON *v.* MORELAND.

(1908. No. 1025.)

Settlement—Tenant for life—Failure of issue male—Power given to tenant for life, "his heirs or assigns," to select portion of settled lands—Exercise of power by tenant for life—Limitation after estates tail—Shifting use—Severable power—Rule against perpetuities.

Certain lands were, upon the marriage of the plaintiff (then Viscount Bernard), settled upon the plaintiff for life, with remainder to his first and every son successively in tail male. In the event of failure of issue of the plaintiff the settlement contained the following clause: "And, in default of such issue, as to such part of the said hereditaments and premises (excepting the castle demesne and the demesne of Castle Bernard) as the said Viscount Bernard (the plaintiff), his heirs or assigns, shall select, not exceeding the gross annual value of £5000, to the use of the trustees or trustee and their heirs, upon trust to convey such part of the said hereditaments and premises as aforesaid to the said Viscount Bernard, his heirs and assigns, for ever, or as he or they shall direct, discharged from all incumbrances whatsoever. And as to the residue of the said hereditaments and premises, subject to all charges and incumbrances now affecting all the hereditaments hereinbefore expressed to be hereby assured, in full indemnification of the part of the said hereditaments and premises so to be selected by the said Viscount Bernard, his heirs and assigns, as aforesaid," to the use of the Hon. and Right Rev. C. B. Bernard for life, with remainder to the use of certain persons therein specified, successively for life, with remainder in tail male to the first and other sons of the last tenant for life with remainder over in default of such issue in strict settlement, and with an ultimate remainder to the right heirs of the plaintiff.

There was no issue of the marriage, and the plaintiff executed two deeds by which, in exercise of his power of selection, he purported to select and appoint certain lands of the prescribed value.

Held, that the two deeds were valid exercises of the power of selection, and that the power of selection which was given to "Viscount Bernard, his heirs or assigns," was divisible, and, in the event which happened, was not void for remoteness.

Miles v. *Harford* (12 Ch. D. 691) applied.

This originating summons was brought for the determination of certain questions which arose upon the construction of the settlement, dated June 19th, 1876, which was executed upon the marriage of the plaintiff, James Francis Bernard, then Viscount Bernard, and afterwards fourth Earl of Bandon, to the Honourable Georgina Evans Freke. The principal question was, whether a particular limitation in the settlement was void for remoteness. It became necessary to have this question determined in consequence of the sale of the settled estates under the Land Purchase Acts.

The settled estates consisted of fee-simple lands situate in the county of Cork, the rental of which was stated to have been in 1876 upwards of £16,000 a year, and to be at the date of the summons upwards of £13,000 a year. The estates had been in settlement since 1782. They were in 1873, during the lifetime of the third Earl of Bandon, and after the coming of age of the plaintiff, disentailed; and, in exercise of the joint power of appointment which was created by that disentailing deed, the third Earl and the plaintiff (then Viscount Bernard) joined in re-settling the lands by the marriage settlement of June 19th, 1876; and thereby appointed them (after previous limitations which are not material) to the use of the third Earl (since deceased) for life, with remainder to the plaintiff for life, with remainder to the first and other sons of the plaintiff successively in tail male.

The clause in the settlement, with the construction of which the summons was concerned, came immediately after the limitation to the first and other sons of the plaintiff in tail male. It ran as follows:—"And, in default of such issue, as to such part of the said hereditaments and premises (excepting the Castle demesne and the demesne of Castle Bernard) as the said Viscount Bernard, his heirs or assigns, shall select, not exceeding the gross annual value of £5000, to the use of the trustees or trustee, and their heirs, upon trust to convey such part of the said hereditaments and premises as aforesaid to the said Viscount Bernard, his heirs and assigns, for ever, or as he or they shall direct, discharged from all incumbrances whatsoever. And as to the residue of the said hereditaments and premises, subject to all charges and incumbrances now affecting all the hereditaments hereinbefore expressed

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to be hereby assured, in full indemnification of the part of the said hereditaments and premises, so to be selected by the said Viscount Bernard, his heirs or assigns, as aforesaid, to the use of the Hon. and Right Rev. Lord Charles Broderick Bernard, D.D., Lord Bishop of Tuam," for life, remainder to his eldest son, Percy B. Bernard, for life, remainder to the latter's eldest son, Ronald Bernard, for life, remainder to the first and other sons of Ronald Bernard, in tail male, with limitations in default of male issue of Ronald Bernard, and with ultimate remainder in default of issue male of other stems of the Bernard family, to the use of the right heirs of the plaintiff.

The relevant events, which happened afterwards, were as follows:—The third Earl, and his brother, the Bishop of Tuam, have died. The plaintiff succeeded as fourth Earl of Bandon, and was at the date of the summons in possession of the settled lands as tenant for life. There had not been any issue of his marriage; and Captain Percy Bernard was, at the date of the summons, heir presumptive to the earldom, and, subject to plaintiff's life estate, to the estates tail to plaintiff's sons, and to the right of selection given to plaintiff, his heirs or assigns, was entitled next in remainder to "the residue" of the settled estate. The plaintiff, by two deeds poll, dated respectively the 2nd September, 1895, and the 19th October, 1908, selected certain denominations of the settled lands within the prescribed annual value of £5000. The estates were being sold under the Land Purchase Acts, and the plaintiff asked the Court by this summons whether these deeds were valid acts of selection. It was objected, on behalf of the tenants-in-tail in remainder of the residue of the settled lands, that the deeds of selection were void for remoteness.

Serjeant O'Connor, K.C., and *H. Wilson, K.C.*, for the defendants:—

The power here is given to Lord Bandon, his heirs or assigns and there is nothing to compel Lord Bandon to exercise it. Therefore, the power can be exercised beyond the period allowed by the rule against perpetuities, and is bad; and a mere exercise of the power within proper limits does not validate the power. A power which cannot be exercised outside the proper limits is not rendered

bad if in the terms in which it is given the power could be exercised at any time, viz., ordinary powers of sale and exchange which cannot be exercised beyond the determination of the trusts of the settlement. In *Grange* v. *Tiving* (1), a power to a settlor, or any of the heirs of his body, to revoke the uses of a settlement, was held to be validly exercised by his daughter, who was his heir. But the question of remoteness does not appear to have been considered, and on this point the case is not considered good law: Sugd. Pow. (8th ed.), p. 152. This is not a case of a power to be exercised with the consent of the person beneficially entitled to the fee. It is an overriding power exercisable without the consent of the beneficial owner, and not collateral to the settlement. Consequently, it is bad, and cannot be modelled so as to be made good: *Ware* v. *Polhill* (2); *Ferrand* v. *Wilson* (3); see also Marsden Perp., p. 240. It may be contended that an estate tail intervenes; but the estate tail might fail, for instance, by reason of the death of an infant tenant-in-tail, and the power would still be in existence and exercisable, and incapable of destruction by the owner of the estate in possession. This power of selection is not a remainder after an estate tail, which must take effect on the termination of the estate tail, as in *Cole* v. *Sewell* (4). It is a shifting use, and need not come into existence during the estate tail. The power could call into existence an estate subsequent to the estate tail, and not dependent on it. The person to exercise the power is not necessarily ascertainable within the proper period, and the power is void: *Re Hargreaves* (5); *Dunn* v. *Flood* (6). The power does not resemble powers of sale and exchange, which are only collateral to the settlement, but amounts to a power of withdrawal paramount to the settlement. An option to purchase in fee at a remote period in a lease given to a man and his heirs is void: *Woodall* v. *Clifton* (7); see also as to the extension of the rules against perpetuities to Common Law conditions: *London and South-Western Railway Co.* v. *Gomm* (8).

(1) Orlando Bridgeman, 107.
(2) 11 Ves. 257.
(3) 4 Hare, 344.
(4) 4 Dr. & W. 1.
(5) 43 Ch. D. 401.
(6) 25 Ch. D. 629.
(7) [1905] 2 Ch. 257.
(8) 20 Ch. D. 562.

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[They also referred to *In re Talbot Crosbie's Estate* (1); *Switzer* v. *Rochford* (2); *In re Doyle's Estate* (3); *In re Tyrrell's Estate* (4).]

The power is not a severable one. *Attenborough* v. *Attenborough* (5) is a border-line case. In *Miles* v. *Harford* (6) the events in which the power was to be exercised were alternative.

Darley, for the trustees.

Matheson, *K.C.*, *A.M. Sullivan*, *K.C.*, and *John R. Peart*, for the plaintiff:—

If the power or right of selection is confined according to the true intent and meaning of the settlement within the limitations of the settlement, it is a perfectly good power. It is hardly a power at all. No stranger to the estate is given dominion over it, but there is a good limitation in remainder as to property not exceeding £5000, in value, and the right of selection is only incidental to it. The estate to be taken is fixed by the settlement, and not by the power, which is only a right of selection. Here the person to take upon the true construction of the settlement must be ascertained within the proper period, and the power of selection is good. It is only part of the machinery for the purpose of segregating one estate from the rest of the property. It gives no estate or power of controlling another's estate, but only amounts to a recital of property to be taken under the settlement. The limitation of "the residue" is a remainder "after" selection and not "in default of" selection. If the right of selection is remote, the limitation of the "residue" would fall within the limitation of the lands to be selected, being inter-dependent as in *Boyce* v. *Boyce* (7), and there would be a resulting trust of all the settled estates in favour of the plaintiff. But we prefer to contend that both limitations are valid. The words "not exceeding" do not render the subject-matter of the limitation of the lands to be selected uncertain: *Thompson* v. *Thompson* (8). Even if that case were not a complete authority

(1) [1905] 1 I. R. 570.
(2) [1906] 1 I. R. 399.
(3) [1907] 1 I. R. 204.
(4) [1907] 1 I. R. 194, 292.
(5) 1 K. & J. 296.
(6) 12 Ch. Div. 691.
(7) 16 Sim. 476.
(8) 1 Coll. 381, at p. 395.

on the point, the maxim of *id certum est quod certum reddi potest* is applicable, and makes the subject-matter of the limitation sufficiently certain for the purposes of a vested remainder, and it has been rendered certain by selection: *Wood* v. *Drew* (1). Assuming the right of selection to be a power, it must be exercised during the continuance of the estate tail or immediately after its determination. The person to take must be ascertained on default of issue, and the act to be done must be done immediately on failure of issue. The right of selection follows the limitations of the settlement, and could not be exercised after the barring of the estate tail or after the vesting of the fee-simple. The circumstances of the power being liable to destruction by the tenant in tail precludes objection on the ground of perpetuity: *Briggs* v. *Bishop of Oxford* (2); *Lantsbery* v. *Collier* (3). No limitation after an estate tail is invalid: *Heasman* v. *Pearse* (4).

It is not necessary to state the time within which a power must be executed if it must be exercised within reasonable time: *Re Lord Sudeley* (5). The trusts of the settlement to which the power is attached must come to an end within the period fixed by the rule against perpetuities, and the power is therefore good. Ordinarily it will be presumed that a power was intended to come to an end when the equitable fee vests in possession; *Re Cotton's Trustees* (6). In *In re Appleby* (7) the trust for sale was bad, but the person to take was ascertainable within the limit and the gift was good, the trust for sale being a mere piece of machinery. Here the objects are perfectly good if all reference to selection were struck out. It was the intention of the parties to create a perfectly good remainder. The words "heirs or assigns" are not words of limitation, but mark out particular persons to do a particular act. It is said that the right of selection is a shifting use; but there was no shifting use, as the sole limitation is to Lord Bandon, his heirs and assigns, on the determination of the estate tail. It is a legal remainder, not a shifting use.

(1) 33 Beav. 610.
(2) 1 D. M. & G. 363.
(3) 2 K. & J. 709.
(4) L. R. 7 Ch. App. 275.
(5) [1894] 1 Ch. 334.
(6) 19 Ch. D. 624.
(7) [1903] 1 Ch. 565.

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Even if the power could be exercisable beyond the proper period, it is severable, and having been rightly exercised by Lord Bandon is valid. *Miles* v. *Harford* (1): *Attenborough* v. *Attenborough* (2). If not severable, it would be valid in accordance with the principles laid down in *Evers* v. *Challis* (3); *Hancock* v. *Watson* (4).

Serjeant O'Connor, in reply :—

If the power had not been exercised by Lord Bandon, it might have been exercised by his "heirs or assigns" after his death, when the whole estate had gone over to those entitled in remainder; and if the power were then exercised by the heirs or assigns, the estate of the remainderman would be defeated, and there would be a shifting use to the trustees of the estate in the selected lands. "Residue" must mean all the hereditaments in the settlement, less by the subtracted part, under the power or right to select. The words "not exceeding" give a right to select up to £5000 or anything short of £5000, and "residue" must mean everything left after selection.

May 18.

BARTON, J. :

[After referring to the contents of the settlement, and to the events which had happened] proceeded :—

This originating summons involves the right to landed estates of the value of £5000 a year. The plaintiff is the present Earl of Bandon, and was at the date of his marriage known as Viscount Bernard. The question for decision is whether two deeds of selection of lands of the value of £5000 a year, which have been executed by plaintiff, are valid exercises of the right of selection of lands not exceeding that value, which was conferred by his marriage settlement upon "Viscount Bernard, his heirs or assigns." The answer to that question depends upon the further question whether the right or power of selection is void for remoteness; and upon the proper construction of the two limitations in

(1) 12 Ch. D. 691.
(2) 1 K. & J. 296.
(3) 7 H. L. Ca. 531.
(4) [1902] A. C. 14.

default of issue male of plaintiff, viz.: (1) the limitation of what, for shortness, I may call the selectable lands; and (2) the limitation of the residue of the settled estates.

A right of this kind to select the subject-matter of a gift is no less a power of appointment than the more familiar right to select the objects of a gift. An example of a limitation depending upon a power to select lands of a certain value is to be found in *Peters* v. *Morehead* (1), referred to in Sugden on Powers, at p. 522. This is, in my opinion, a power of that sort. If "Viscount Bernard" had been the sole donee of the power, no difficulty would have arisen. The limitation of the selectable lands—whether it be regarded as a remainder or as an executory limitation—must, if it had been dependent solely on his exercise of the right of selection, have vested, if at all, before or at the moment of the determination of the preceding estates tail. No vested remainder is ever remote; and no contingent remainder after estate tail can be remote: *Cole* v. *Sewell* (2); *In re Frost* (3); for the reasons given by Bushe, C.J., in *Jack* v. *Fetherston* (4). Indeed, no limitation after estates tail can be remote *if*—mark the important *if*—the legal and beneficial interest must be both ascertainable at latest at the moment of the determination of the estate tail: *Heasman* v. *Pearse* (5). But this right of selection is also given to the "heirs or assigns" of Viscount Bernard. It, therefore, contemplates events which may occur, a power which may be exercised, donees of that power who will not be necessarily ascertainable, and an interest in land limited so as to be capable of arising—at a time subsequent to the determination of estates tail, and not necessarily within the period allowed by law. A limitation of that kind, unless it be divisible or separable, clearly violates the rule against remoteness: *London & South-Western Railway* v. *Gomm* (6); *In re Hargreaves* (7); *Savill Brothers, Limited,* v. *Bethell* (8); *Edwards* v. *Edwards* (9).

(1) Fort. 339; Fitz. 156.
(2) 4 Dr. & War. 1.
(3) 43 Ch. D. 246.
(4) 2 Huds. & Br. 320.
(5) L. R. 7 Ch. 275, 283.
(6) 20 Ch. D. 562.
(7) 43 Ch. D. 401.
(8) [1902] 2 Ch. 523, 540, 541.
(9) [1909] A. C. 275.

Barton, J. 1909.

EARL OF BANDON v. MORELAND.

that in this particular context it was contemplated by the words "Viscount Bernard, his heirs or assigns," that there were to be three alternative classes of selectors, viz., (1) Viscount Bernard; (2) his heirs, *e.g.*, a daughter or daughters if he died intestate leaving no son, and without having selected lands or made any disposition of his interest; (3) his assignees or devisees. In this way a meaning is given to each word, including "or," which, having regard to the occurrence of the words "heirs and assigns" in the same sentence, should be read in the context in some distributive, substitutional, or alternative sense. I read the words disjunctively, as equivalent to "Viscount Bernard or his heirs or his assigns." That is the ordinary grammatical way of reading three names or nouns with an "or" interpolated between the second and third. What difficulty, then, is there in severing "heirs or assigns" in this context from "Viscount Bernard"? The question, as Jessel, M.R., said, is one of expression. We must not allow ourselves to be misled or mystified by the familiar sound of a conveyancing phrase. If the settlement contemplated separate classes of selectors and separate events, and expressed them in separate words, why may we not divide them? The words "heirs or assigns" are, in my opinion, severable from "Viscount Bernard," just as the words "or any of the issue male of his body" were severable from "the son" in *Miles* v. *Harford* (1). The present case is not so easy or so clear; it is nearer the frontier. But it is, in my opinion, within the boundaries of the same principle.

This view of the case relieves me from the necessity of considering other aspects of this case, *e.g.*, the applicability of *Evers* v. *Challis* (2), as explained in *Hancock* v. *Watson* (3). I express no opinion upon these topics. I hold that the limitation was severable, and, in the events which have happened, was not void for remoteness.

Solicitor for plaintiff: *Clifford Lloyd.*
Solicitors for the trustees: *Maunsell, Darley, & Orpen.*
Solicitors for defendants: *Reeves & Sons.*

R. W. L.

(1) 12 Ch. D. 691. (2) 7 H. L. Cas. 531. (3) [1902] A. C. 14

In Re LYNDERS, and the VENDOR and PURCHASER ACT, 1874.

Barton, J.
1910.
Mar. 22.
April 26.
May 4.

(1910. No. 238.)

Vendor and Purchaser—Agreement for purchase under Land Purchase Acts—Subsequent sale by tenant—Notice of intention to sell—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 1—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 35.

When a Land Purchase agreement, conditional upon the estate of which the holding is a portion being sold under the Land Purchase Acts, has been entered into between landlord and tenant, the legal tenancy is not thereby determined; and the tenant, if he wishes to sell his interest in his holding with the benefit of the purchase agreement to a third party, is not relieved from the obligation of giving to the landlord the notice and information required by s. 1 of the Land Law (Ireland) Act, 1881.

R. (*Fitzwilliam*) v. *County Council of Wicklow* (40 I. L. T. R. 180), explained.

Vendor and Purchaser Summons :—

The summons, which had been taken out by the vendor, asked to have it declared, *inter alia*, that the vendor was not bound to obtain the consent of the landlord to the sale. By the agreement, dated September 16th, 1909, the vendor, Richard Lynders, agreed to sell to the purchasers, the Lord Mayor, Aldermen, and Burgesses of the City of Dublin, the County Council of the County of Dublin, the County Council of the County of Wicklow, and the County Council of the County of Louth, acting through the Joint Committee of Management of the Richmond District Lunatic Asylum, all his interest in the lands of Balcarrick and Ballymaston, situate at Donabate in the County of Dublin, held by the vendor as tenant from year to year under W. N. Rathbourne and others, and for which lands an agreement dated the 31st May, 1906, for purchase under the Land Act,

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1903, had been entered into by the vendor with his said landlords. Under this land purchase agreement of the 31st May, 1906, interest upon the amount of the purchase-money was payable by the vendor; and the agreement was, as usual, conditional upon the estate, of which the holding formed a portion, being sold under the Land Purchase Acts.

In correspondence, subsequent to the sale, Mr. Dillon, the purchasers' solicitor, asked the vendor to obtain the landlords' consent to the sale; but, on the vendor asking for such consent, it was refused unless a guarantee was given to the landlords in reference to the bonus. The purchasers refused to complete without such consent, and furnished their requisitions, the first of which was as follows:—"The consent of the landlords, subject to the provisions of the Land Acts, must be obtained in the event of the sale by the Estates Commissioners not going through." The vendor's reply to this requisition was:—"Vendor's solicitor refuses to obtain this consent, which is unnecessary, as the relation of landlord and tenant does not exist since the signing of the land-purchase agreement." It was agreed by both parties that the requisition, although it might be technically incorrect in form, involved the question whether the vendor was under an obligation to give to the landlords the notice and information required by section 1 of the Land Law (Ireland) Act, 1881; and the arguments proceeded upon that basis.

M'Ilroy, K.C., for the vendor:—

The notice of intention to sell a tenancy required by section 1 of Land Law (Ireland) Act, 1881, 44 & 45 Vict. c. 49, is only required as between landlord and tenant, and in this present case that relation ceased on the execution of the agreement to purchase, and pending its completion. The effect of the agreement is to make the purchaser equitable owner in fee of the lands, the vendor becoming a trustee for him: *Shaw* v. *Foster* (1); *Lysaght* v. *Edwards* (2). To constitute the relation of landlord and tenant there must be an agreement by one party to hold land under another in consideration of a rent: Landlord and

(1) L. R. 5 H. L. 333. (2) 2 Ch. D., at p. 506.

Tenant Act, 1860, section 3; Land Law (Ireland) Act, 1881, section 57. When the tenant agrees to buy his holding under the Land Purchase Acts, he ceases to pay rent pending the completion of the sale: Land Law (Ireland) Act, 1896, 59 & 60 Vict. c. 47, section 35; *R.* (*Fitzwilliam*) v. *Wicklow County Council* (1) is an express decision that the relation of landlord and tenant ceases when an agreement to purchase is entered into: see also *In re Cavanagh's Estate* (2). If the purchasers' contention is right, then on service of notice the landlord may exercise his right to purchase the tenancy, notwithstanding that he has agreed to sell the reversion in fee to the tenant. Even if notice should have been served, the remedy of the landlord is to apply to the Court within one fortnight after the sale comes to his knowledge, to declare the sale void: Land Act, 1881, section 1, sub-section 5, Rule 101, Land Act Rules. The landlord had notice of the sale several months ago, and he has taken no step to have the sale declared void, and he cannot now do so.

M'Cann, K.C., and *M'Auley*, for the purchasers:—

Apart from the provisions of the Irish Land Code the legal interest in a tenancy continues to subsist notwithstanding a contract by the tenant for the purchase of the landlord's interest (Dart on Vendors and Purchasers, p. 514). There is nothing in the Land Purchase Acts to affect this principle as applicable to a sale under the Act of 1903. Section 35 of the Land Law (Ireland) Act, 1896, does not purport to enact that the execution and lodgment of an agreement for purchase is to have the effect of putting an end to the tenancy, and it expressly provides that if the advance is refused the agreement shall be void. The vendor's contention would seem to be that once an agreement for purchase is executed and lodged there is no longer any landlord or tenant within the definition of the Irish Land Code. If this be the correct view, it follows that the tenant, after the agreement is signed and lodged, could subdivide the holding, notwithstanding section 2 of the Land Law (Ireland) Act, 1881, and that the

(1) 40 Ir. L. T. R. 180.
(2) [1909] 1 Ir. R. 63, at p. 69.

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subdivision would be valid and binding on the landlord, although the agreement ultimately fell through : *R.* (*Fitzwilliam*) v. *Wicklow County Council* (1) is not an authority against the purchasers' contention. It was a decision on very special facts, and it is submitted that it was not intended by the Court to decide that the effect of the agreement to purchase under the Land Purchase Acts is to put an end to the relationship of landlord and tenant for all purposes.

As regards the argument based on Rule 101 of the Rules, it was not intended by that Rule to dispense with the statutory formalities prescribed by section 1. The landlord's right of pre-emption only arises on service of the notice under that section. The Land Commission, under Rule 22 of their Rules, would have power to extend any of the periods of time prescribed by the Rule, and the general practice of Irish conveyancing counsel is to insist on notice being served in each case. If the Court compels the purchasers to complete in the circumstances of the present case, it would be compelling them to purchase a possible lawsuit : see *Marshall and Salt's Contract* (2), and Webster on Conditions of Sale, pp. 186, 189, 206.

May 4.

BARTON, J. :—

The question is, whether the vendor should give to his landlord the notice and information prescribed by section 1 of the Land Act of 1881, by sub-section 5 of which it is provided that if a tenant, who is selling his interest to a third party, fails to give the notice or information required by the preceding sub-sections, the Court may, if it thinks fit, and that the just interests of the landlord so require, declare the sale void.

It has been assumed, in the arguments, that this question depends upon the further question whether the vendor's legal tenancy had been determined by the agreement into which he had previously entered with his landlord for the purchase under the Land Purchase Acts of his landlord's interest in the "holding."

(1) 40 I. L. T. R. 180. (2) [1900] 2 Ch. 202.

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The Land Purchase agreement was a conditional one, being conditional upon the estate, of which the vendor's holding was a portion, being sold under the Land Purchase Acts.

A conditional agreement of this kind under the Land Purchase Acts, for the sale by the landlord to the tenant of the landlord's interest in the holding, has important consequences upon the relations between the parties to it. It has the effect of making the landlord-vendor a trustee for the tenant-purchaser of the landlord's fee-simple reversion; and of suspending, during the carrying out of the sale, some of the respective rights and remedies of landlord and tenant. But it does not, in my opinion, determine the legal tenancy. The legal tenancy is not the subject-matter of the sale. It is not the landlord's to sell. It does not merge in the fee until completion.

It is well settled, as a general rule, that when a lessee or tenant from year to year enters into an agreement with his landlord to purchase the land which he holds from him, the agreement, being conditional on a good title being made, does not operate as a surrender or determination of the legal tenancy, although it gives the tenant-purchaser his equitable rights as purchaser, including the right to rents and profits, with liability to interest: *Doe* v. *Stanion* (1); *Tarte* v. *Darby* (2); Foa on Landlord and Tenant, p. 581; Sugden's Vendor and Purchaser (14th ed.), p. 178; Dart on Vendor and Purchaser (7th ed.), p. 514; Williams' Vendor and Purchaser, at p. 458. Section 35 of the Land Act of 1896 does not seem, in principle, to conflict, *quoad* the payment of interest, with the rule at common law.

Mr. M'Ilroy relied upon some words attributed to the Lord Chief Baron at the end of his judgment as reported in *R.* (*Fitzwilliam*) v. *Wicklow County Council* (3). That case was concerned with the character of the occupation, for the purpose of rates, of a small piece of bog, out of which the landlord before the date of the land-purchase agreement received a rent for bog leave. After the purchase agreement the landlord apparently received no rent or profit out of the bog, of which the tenant

(1) 1 M. & W. 695. (2) 15 M. & W. 601.
(3) 40 I. L. T. R. 180.

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thenceforward had the entire beneficial enjoyment. The Lord Chief Baron has been so kind as to give me the following memorandum, and to allow me to use it:—"Our judgment was that *quoad* the question involved there, viz., the character of the occupation in respect of liability to rates, the occupation should be deemed to be that of the purchaser from Lord Fitzwilliam, and not that of his tenant; as, *quoad* the liability to rates, the relation of landlord and tenant had ceased to exist, just as the liability to rent ceases and liability to interest commences at the time of the agreement." Similarly, I understand Holmes, L.J., in the passage cited from his judgment in *Cavanagh's Estate* (1), to have been speaking of the relation of the landlord and tenant *quoad* the question before the Court in that case, *i.e.* the question of rent.

When a tenant (pending a sale under the Land Purchase Acts) sells his interest in the holding to a third party, he is, in effect, selling two things, (1) his tenancy, and (2) the benefit of his contract with his landlord to purchase the reversion. *Qua* the latter, his right of sale is unqualified; but *qua* the former, section 1 of the Land Act of 1881 qualifies what otherwise would be his unrestricted right of sale.

The landlord is, it is true, from the date of the conditional agreement, a trustee of the reversion for the tenant; and the tenant is in Equity the owner of the reversion. But the landlord is a trustee who has a substantial interest, which he is entitled to protect. That is largely so in the case of every vendor. The trusteeship of a vendor was described by Lord Cairns in *Shaw* v. *Foster* (2) in terms which show that, after the relation of vendor and purchaser has been created, the vendor is a trustee with rights which he may protect. "Under these circumstances," said Lord Cairns, "I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and purchaser. The vendor was a trustee of the property for the purchaser. The purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a

(1) [1909] 1 I. R. 63. (2) L. R. 5; H. L. 321, 338.

trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation therefore of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." These words of Lord Cairns seem to me to be applicable to the position of the landlord-vendor pending the completion of one of these conditional agreements.

As regards the arguments *ab inconvenienti*, I attach very little importance to them. If the landlord's right to object on reasonable grounds to a purchaser is taken away pending the sale, he is no worse off than he would be at Common Law. If the tenant is still subject to the obligation of serving his notice, he is no worse off than he was before the date of the agreement, and the notice cannot operate effectively, unless the sale under the Land Purchase Acts falls through. There is, however, one point which deserves to be noted. If the legal tenancy of a tenant-purchaser is determined by a conditional agreement of this kind, it might have serious consequences for the tenant. Several questions suggest themselves. For example, would the tenant-purchaser, if his tenancy was determined, be a future tenant in the event of the sale not being completed? In the view which I have taken, no point of this kind could arise; and I need not discuss it.

Several questions were alluded to in the course of the arguments which do not call for decision upon this summons. Would the landlord be entitled to pre-empt? or would he be restrainable in Equity from exercising that right, as being inconsistent with the pending land-purchase agreement? Would the landlord be entitled to object to the purchaser on reasonable grounds? How are the rules as to the time for pre-empting and objecting to be reconciled with the pending land-purchase agreement? I express no opinion upon these questions, which do not arise upon this requisition. It is, however, conceded on both sides that this requisition raises the broad question of principle, whether the vendor was relieved from the obligation of giving the notice and information required by section 1 of the Act of 1881. That question has to be decided; and, as I can see no grounds for

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holding that the legal tenancy has been determined, I am of opinion that it must be answered in the negative.

I may add that this decision is in accordance with the practice of conveyancers. The conveyancing counsel, both those attached to these Courts, and the general body of conveyancers in the profession, have, if I am rightly informed, ever since the Purchase Acts were passed, been, as a general rule, in the habit of advising that, in a case of this kind, the notice under section 1 of the Land Act of 1881 should be given; and I should be altering the settled practice which has existed for a number of years if I were to yield to the opposite contention.

Solicitor for the vendor: *C. M. Grimes.*
Solicitor for the purchaser: *William Dillon.*

W. M'G.

IN RE THOMAS GREALLY, DECEASED, EDWARD JOSEPH TRAVERS *v.* CATHERINE O'DONOGHUE.

M. R.
1910.
April 18.

Will—Construction—Legacy—Residuary legatee—Primarily referable to legatee of personal estate—When having an extended meaning—May embrace real estate—Charitable legacy, failure of—7 & 8 Vict. c. 97, s. 16.

Prima facie "residuary legatee" refers only to the legatee of personal estate; but the context may enable the Court to give a wider meaning to the words "residuary legatee," and to hold that the words are wide enough to embrace real estate, which, in the events that have happened, is undisposed of.

Pitman v. *Stevens* (15 East, 505) applied.

SUMMONS in an administration matter.

The testator, Thomas Greally, made his will in the following terms:—"This is the last will and testament of me, Thomas Greally, of No. 18 Patrick Street, Dublin, and I hereby revoke all former and other wills or will by me at any time heretofore made. I give, devise, and bequeath all my property, whether real or personal, to my aunt, Margaret Dempsey, widow, whom I hereby appoint sole executrix and trustee of this my will upon the following trusts *videlicet*:—I leave and bequeath to her for her own sole use and benefit during her life the rents now receivable by me out of four holdings I have in Dolphin's Barn, Dublin, and out of two other holdings I have in the county Monaghan and the county Sligo, and upon her decease I give, devise, and bequeath the rents payable out of all said six holdings (save the one in Dolphin's Barn, which I have otherwise disposed of as will hereinafter appear) to my brother, John Greally, for his life, and until his bankruptcy, and on the happening of either of said events, then to his wife for life, and on her death, or upon the death or bankruptcy of said John Greally, if a widower, when either of said events shall happen, then I give, devise, and bequeath all said holdings (save the one otherwise dealt with as hereinafter mentioned) equally to and

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amongst such children of the said John Greally as shall then be living. I give, devise, and bequeath to the trustees of the Mater Misericordiæ Hospital the premises in Dolphin's Barn, Dublin, described as lot one in the rental under which I purchased, and formerly in occupation of James Biron, containing 2 acres and 2 roods, and producing £11 10*s.* 3½*d.*, under deed of 11th March, 1858, such rent to be applied for ever by said hospital in supporting a bed to be called the "Greally Bed." I give and bequeath the following legacies to be paid on my death, viz., to my sister, Eliza Dempsey, widow, £50, and my teapot, coffee-pot, cream-jug, and sugar-bowl, belonging to my silver tea and coffee service; to my sister, Anne Travers, widow, £50; to my sister, Mary Bradshaw, for her own sole use, independent of her husband, £50; to my brother, John Greally, the silver cream-jug and sugar-bowl which belonged to my mother, and £50. I leave, devise, and bequeath to my aunt, Margaret Dempsey, for her own use absolutely, the house and premises, No. 18 Patrick Street, together with all the furniture, books, pictures, and other effects in same, and all the stock-in-trade in the shop, and the good-will of my business, and all debts due to said business; and I nominate and appoint my said aunt as my sole residuary legatee. I trust the landlord of said house will continue my aunt as tenant of same. I desire that the money due to me by Miles Keogh shall be accepted from him by instalments as he shall be able to pay it. I desire that a sum of £25 be given to Father Daniel to say an Office and High Mass for the repose of my soul. I give and bequeath to Margaret Ferris £5. In witness whereof I have hereto signed my name this 13th day of October, 1883, Thomas Greally."

The said testator, Thomas Greally, died on the 5th January, 1884, within three months of the making of his said will. An order for administration of the estate of the said Thomas Greally having been made on the 29th October, 1906, pursuant to a summons, dated 25th September, 1906, the present summons in the matter was taken out by the representatives of the residuary legatee to determine (*inter alia*) the question whether the real estate devised by the will, dated 13th October, 1883, of Thomas Greally, the testator, to the Mater Misericordiæ Hospital, and which devise

failed by reason of the death of the said testator within three months of the date of his said will, passed to Margaret Dempsey under the residuary disposition contained in the said will of the testator, or whether the said Thomas Greally, the testator herein, died intestate as to such real estate."

The property so devised to the Mater Misericordiæ Hospital was of fee-farm tenure.

D. J. O'Brien, for the representatives of the residuary legatee :—

The testator nominates his aunt his sole residuary legatee. He does not intend by his will to die intestate. The dominant intention is to dispose of everything: *Hughes* v. *Pritchard* (1); *Gethin* v. *Allen* (2); *In re Methuen and Blore's Contract* (3). Regard must be had to the whole frame of the will.

S. L. Devitt (with him *James O'Connor, K.C.*), for the heir-at-law :—

Tho testator had disposed of all his real property, and so the words "residuary legatee" should be confined to the personalty and not extended to include realty. There are no words in the will that should coerce the Court to enlarge the operation of the appointment of a residuary legatee: *Cooney* v. *Nicholls* (4); *Gethin* v. *Allen* (2). The fact that testator disposed of all his real estate shows clearly that he intended the residuary legatee to take only the residue of any personal property: *Hughes* v. *Pritchard* (1) is distinguishable, as there the testator had omitted to dispose of part of his real estate, and used words from which the Court inferred the residuary legatee was to take any undisposed of property, real or personal.

THE MASTER OF THE ROLLS :—

I hold that the words "residuary legatee" in this particular will are wide enough to embrace the real estate which, in the events that happened, was undisposed of. It would be mere

(1) 6 Ch. D. 24.
(2) 23 L. R. Ir. 236.
(3) 16 Ch. D. 696.
(4) 7 L. R. Ir. 107.

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pedantry to review the cases which have been reviewed by the Court of Appeal and by my predecessor. *Prima facie* the word "legatee" does not embrace the word "devisee." *Prima facie* "residuary legatee" refers only to the legatee of personal estate. But the context may enable the Court to give a wider meaning to the words "residuary legatee." The case of *Pitman* v. *Stevens* (1), decided in the year 1812, is the leading case on the subject. Lord Ellenborough there states (p. 510) the general principle which has been adhered to ever since—"In the construction of wills hardly any words are to be found of so stubborn and inflexible a meaning as not to bend to the plain sense of the context. Here the testator begins by giving and bequeathing 'all that he shall die possessed of, *real* and personal, of what nature and kind soever, after his just debts paid.' The stress of the argument for the defendant is, that the person is not expressed to whom the testator has so given and bequeathed all his real and personal estate; but the words show his intention to dispose of all he had (and the question as to the realty is as to nothing or all); and they will assist in construing other words. Then he appoints Captain Preston his residuary legatee and executor; residuary legatee and executor of what? 'Of all that he should die possessed of real and personal of what nature and kind soever.' That is all that he should not otherwise dispose of. The word legatee according to the cases, particularly *Hardacre* v. *Nash* (2), may be applied to real estate if the context require it, as was said by Lord Kenyon upon the word legacy." The opening words in that particular will were—"I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts is [*sic*] paid. I do hereby appoint Captain Robert Preston my residuary legatee and executor." Now, I take this will, the will of Thomas Greally—"I give, devise, and bequeath all my property, whether real or personal, to my aunt, Margaret Dempsey, widow, whom I hereby appoint sole executrix and trustee of this my will." He deals both with his personal estate and his real estate. Among other portions of his real estate were the premises in Dolphin's Barn devised to the hospital. But unfortunately

(1) 15 East, 505. (2) 5 Term. Rep. 716.

for the hospital he died within three months after the execution of the will and the gift to the charity therefore fails. He winds up his will with the phrase—"I nominate and appoint my said aunt as my sole residuary legatee." I think that the context of this particular will enables and practically coerces me to hold that under those words the lapsed gift passes to Margaret Dempsey. I will allow the heir-at-law his costs.

Solicitor for the representatives of the residuary legatee: *L. J. O'Neill.*

Solicitor for the representatives of the heir-at-law: *D. J. Reilly.*

A. C.

ROBB *v.* WATSON.

Ross, J.
1910.
May 2, 10.

Policy of life insurance—Insurance for benefit of wife—Married Women's Property Act, 1870, *s.* 10—*Assignment by husband during lifetime of wife—Interest or* spes successionis.

Where a trust is created by a policy of insurance expressed to be made by a husband for the benefit of his wife under s. 10 of the Married Women's Property Act, 1870, the interest of the husband in the policy is (subject to the trust in favour of the wife) an interest capable of assignment by the husband during the lifetime of the wife.

A husband in 1882 by a policy expressed to be issued under the Married Women's Property Act, 1870, insured his life "for the sole benefit of his wife, for her separate use under the Married Women's Property Act, 1870," and in 1901, his wife being still alive, assigned to a trustee upon trust for the benefit of his creditors, *inter alia*, all other his personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy. The wife died in 1907.

Held, that the husband's interest in the policy was captured by the deed of assignment and passed to the trustee subject to the trust in favour of the wife.

TRIAL of action on special case.

The facts and the questions for the opinion of the Court fully appear in the special case, which was as follows:—

This action was commenced on 10th February, 1910, by a writ of summons whereby the plaintiff claimed a declaration that

Ross, J. 1910.

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the moneys payable under a certain policy of insurance entered into by the defendant on his own life with the Hand-in-Hand Fire and Life Insurance Society, and dated 13th March, 1882, are vested in the plaintiff as trustee, under a deed of assignment, dated 15th October, 1901, and made between the defendant of the first part, the plaintiff of the second part, and certain persons being creditors of the defendant of the third part; and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court :—

1. By said policy of insurance, dated 13th March, 1882, and expressed to be issued under the Married Women's Property Act, 1870, the defendant, for the consideration therein mentioned, effected a policy of insurance on his own life in the sum of £1000, the sum insured to be for the sole benefit of his wife, Elizabeth Watson, for her separate use under the Married Women's Property Act, 1870. And it was by said policy provided that the funds and property of the Society should be liable to pay to the executors, administrators, or assigns of the defendant the said sum of £1000, within three calendar months next after satisfactory proof of his death should be received at the office of the Society. The parties beg to refer to the said policy, which is incorporated with this case.

2. The defendant has continued to pay the premiums on foot of the said policy of insurance down to the present time, and the said policy is still subsisting and in full force.

3. By said indenture, dated 15th October, 1901, and made between the defendant of the first part, the plaintiff of the second part, and certain other persons being creditors of the defendant of the third part, the defendant assigned to the plaintiff, his executors, administrators, and assigns, *inter alia*, certain personal property therein specifically mentioned, "and all other the personal estate and effects whatsoever and wheresoever, of the said debtor" (being the defendant), "whether in possession, reversion, remainder, or expectancy." To hold the same unto the plaintiff absolutely upon the trusts therein mentioned, being trusts for the benefit of the said creditors. The parties beg to refer to the said deed, which is incorporated with this case.

4. The said Elizabeth Watson, wife of the defendant, died on the 10th February, 1907, intestate; and letters of administration of her personal estate were granted to the defendant on 27th February, 1907. The parties beg to refer to the said letters of administration, which are incorporated with this case.

The questions for the opinion of the Court are—(1) whether the defendant at the time of the execution of the said indenture mentioned in the third paragraph hereof, had any such interest in the said policy or policy moneys as would be captured by and pass to the plaintiff under the provisions of the said indenture? or (2) whether the said policy or policy moneys were the sole property of the said Elizabeth Watson, at the date of the execution of the said indenture, and, whether the same were part of her estate at the time of her death, and were acquired by the defendant by his marital right on the death of the said Elizabeth.

The third question in the special case is not material to the present report.

James Andrews, for the plaintiff:—

Any interest taken by the wife under a policy expressed to be made for the benefit of the wife under the Married Women's Property Acts, is contingent on her surviving the insured. The policy in the present case is exceptional in that the policy moneys are expressly made payable to the executors, administrators, or assigns of the insured. There was in the insured an interest as distinguished from a *spes successionis* at the date of the assignment to the plaintiff. There is a resulting trust in favour of the insured, which interest the insured could and did deal with by way of assignment: *In re Adam's Policy Trusts* (1); *In re Seyton* (2); *Cleaver* v. *Mutual Reserve Fund Life Association* (3). Porter on Insurance (5th ed.), pp. 371, 373.

J. S. Baxter, for the defendant:—

At the date of the assignment to the plaintiff in 1901, the defendant had no interest in the policy moneys; he had only a *spes successionis* or possibility. His having an interest depended

(1) [1883] 23 Ch. D. 525. (2) [1887] 34 Ch. D. 511.
(3) [1892] 1 Q. B. 147.

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on—(1) his wife dying before him; (2) his wife dying intestate. A right depending on a double contingency is not "an interest"; it would not vest in a trustee in bankruptcy: *Ex parte Dever* (1).

2. In 1901 there was an "object of the trust remaining" and therefore, under the words of the section, the policy moneys were not then part of the defendant's estate.

3. The husband succeeds by marital right. Such a right is analogous to the right of one of the next-of-kin of a living person to succeed on that person's death intestate. That is a mere *spes successionis*: *In re Parsons* (2), dissenting from *In re Beaupre's Trusts* (3); and not an interest, nor property, and does not pass to a trustee in bankruptcy: *In the Goods of Turner* (4); *In re Chichester's Estate* (5). *In re Adam's Policy Trusts* (6), and *In re Seyton* (7) turn on the particular limitations in the policies. *Cleaver's Case*, (8) was decided on its special facts, and only means that when the *cestui que trust* by his own unlawful act determines the trust, then there is a resulting trust in favour of the insured: *per* Lord Esher, at p. 153. The policy moneys here are assets of the widow: Macqueen, Husband and Wife (4th ed.), p. 350.

[Ross, J.:—What is the effect of the words in the Act, "so long as any object of the trust remains"?]

When the object disappears, the policy moneys become then, and only then, part of the husband's estate.

May. 10. Ross, J.:—

The question in dispute has been very conveniently raised in a special case. It is shortly this, whether at the time of the execution of the deed of 15th October, 1901, the husband had such an interest in the policy as would be captured by that deed. The point is not covered by authority. The learned authors of the principal text-books do not seem to be in agreement on the

(1) [1887] 18 Q. B. D. 660.
(2) 45 Ch. D. 51.
(3) 21 L. R. Ir. 397.
(4) 12 Pr. D. 18.
(5) [1908] 1 I. R. 297.
(6) [1883] 23 Ch. D. 525.
(7) [1887] 34 Ch. D. 511.
(8) [1892] 1 Q. B. 147.

question. Under these circumstances it becomes my duty to ascertain what are the real meaning and effect of the 10th section of the Married Women's Property Act of 1870.

Let us first consider how the case would stand, if the statute had never been passed. Suppose, apart from the statute, a married man has effected a policy of insurance on his own life expressed to be for the benefit of his wife. The policy is kept alive by the husband. All the premiums are paid by him; he is the only party who has established a contractual relationship with the Company. The money at his death must be paid to his executors, and the wife has no means of enforcing a trust.

This state of affairs is altered by the statute. The policy so effected and expressed on the face of it to be for the benefit of the wife shall enure and be deemed a trust for the benefit of his wife for her separate use. We thus have an effective trust conferred by the statute for the benefit of the wife, which is safe against any claim on the part of the husband or his creditors.

If the section stopped there, the entire interest would be taken for the purposes of the trust, and all the husband's interest in the policy would disappear. He would merely have a hope of succession, which depends altogether upon the manner in which the wife dealt with the trust property. If she bequeathed it to another, he would take nothing. If she died intestate, he would take it all, by virtue of his marital right. Now, this hope of succession is not personal estate of the husband in possession, reversion, remainder, or expectancy. It is not an estate at all. It is nothing more than a mere expectation, which may or may not be fulfilled.

But the section does not stop where I have stopped. Words follow which show that the trust in favour of the wife is strictly limited. These words are—"And shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate." From these words we must necessarily infer that, when the trust is satisfied, the interest in the policy is subject to the control of the husband or his creditors, and forms part of his estate. In other words, so much is abstracted from his estate for such time as is necessary for the satisfaction of the trusts, and when the object of the trust

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disappears, the interest in the policy remains personal estate of the husband freed and discharged from the trust.

This is not the case of the husband acquiring an estate by the occurrence of various contingencies. It is his own estate, except in so far as it is required to support the objects of the trust. The objects of the trust may be many. The insurance may be for the benefit of the wife and a large family of children, all of whom the husband may survive. The objects of the trust may drop off at different times, until at last he holds the interest in the policy completely free from the trust. This is not the acquirement of an estate by the occurrence of various contingencies. It is the retention of an estate until the burdens disappear. Can the husband then surrender the policy? Certainly not; the trust prevents him. Can he deal with the interest that is his, subject to the trust? I think he can. The interest was a subsisting interest in him at the time of the execution of the deed of 15th October, 1901; the policy was part of his estate, subject to the trust in favour of the wife, and, that being so, I am of opinion that it passed by virtue of that deed to the plaintiff. I shall, therefore, answer the first question in the affirmative, and the second in the negative.

Solicitors for the plaintiff: *Shean & Dickson.*
Solicitors for the defendant: *W. B. Galway & Boas.*

D. M. S.

IN RE ESTATE OF ELLIOTT MOTHERWELL, DECEASED; KEANE AND ANOTHER *v.* MOTHERWELL AND OTHERS.

Barton, J.
1910.
April 27, 28.
May 12.

(1907. No. 932.)

Will—Construction of—Circumstances indicating intention to disinherit the heir—Construction reddendo singula singulis.

M. by his will left his farm of F., held in fee-simple, to his wife for life, and he gave to her also an annuity of £100 a year for life. He also gave an annuity of £25 a year for life to H., his heiress-at-law, and of £25 a year to his cousin, Margaret M., for her life, and after her death to her niece for life. He also gave to his herd and his wife a house and garden for their lives. "After the death of these parties named in my will, and if my wife has no children of me," he bequeathed all his fee-simple property in C., and the farm of F., to the Church of Ireland Representative Body for the benefit of three parishes, "they to pay all my debts, funeral, and testamentary expenses." The testator left him surviving his widow, and H., his heiress-at-law and only next-of-kin. It was estimated that there would be a surplus of £100 yearly out of the fee-simple property in C. after paying the annuities.

Held, that the words "after the death of these parties named in my will, and if my wife has no children of me," should be read distributively, and that the charitable devisees took an immediate interest in the fee-simple lands of C. to the extent to which the persons named were not to take under the will.

Held, also, that the Representative Church Body were devisees in trust, and that their statutory incapacity to take under the devise did not defeat the testator's charitable intention, which would be carried out by means of a scheme.

ADJOURNED SUMMONS.

On the application of the plaintiffs, the executors of Elliot Motherwell deceased, an order for the administration of the real and personal estate of the deceased was made on 5th November, 1907. On further consideration of the chief clerk's certificate questions were raised as to the interpretation of the will of the deceased, dated 3rd January, 1904, the material portions of which are as follow:—"I give and bequeath, to my wife, Clara R. Motherwell, my farm of Foxfield, townland of Omard, for her

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life only. I also give and bequeath to her the furniture in the dwelling-house, farm stock, crop and farm implements on said farm, and I give and bequeath to her £100 per year, for her life only. I give and bequeath to my sister, Orinda Hester Longford, £25 per year, for her life only. I give and bequeath to my cousin, Margaret Motherwell, £25 per year for her life only, and after death to pay said annuity to her niece, Eliza Gildea, for her life only. I give and bequeath to Peter M'Gaughran and his wife Ann, the house and garden they now have for their lives only, and grass for a cow, summer and winter. After the death of these parties named in my will, and if my wife has no children of me, I give and bequeath to the Church Representative Body all my property in Clones, county Monaghan, and Foxfield, county Cavan, for the benefit of Clones parish, diocese of Clogher, Kildramferton, diocese of Kilmore, and Tamlaght O'Crilly, diocese of Derry, they to pay all my debts, and funeral and testamentary expenses, to be divided equally between the three parishes." By the chief clerk's certificate it was found that the debts due by the deceased amounted to £637 8*s.* 5*d.*, that the funeral expenses amounted to £14 8*s.* 6*d.*, that the sole next-of-kin of the deceased was the defendant, Orinda Hester Longford, his sister, who was also heiress-at-law, and that the testator also left his widow, the defendant, Clara E. Motherwell, him surviving. The personal estate of the deceased consisted of £215 consolidated stock of the Midland Great Western Railway of Ireland; 115 shares of the Clontarf Baths and Assembly Rooms Company, Limited, stated to be worth 7*s.* 6*d.* or 10*s.* a share, and 45 shares of £1 each in the Kilnaleck Co-operative Creamery Company. The real estate of the deceased consisted of part of the lands of Foxfield, otherwise Omard, containing 145 acres, statute measure, held in fee-simple, and houses in the town of Clones, and lands in the townlands of Legar Hill, Clonkirk, Largy and Clondergole in the barony of Dartry, county Monaghan, all held in fee-simple. The title-deeds of all the real estate, and the certificates of the Midland Great Western Railway shares, were held by the Bank of Ireland, as security for a loan on foot of which £421 was due. It was estimated that after payment of the annuities there would be a surplus of £100 a year out of the Clones property.

Chaytor, K.C., and *T. J. Smith*, for the plaintiffs, the executors of the will of deceased.

Jellett, K.C., and *Darley*, for the Representative Church Body:—

The lands given by the will exceed thirty acres, and therefore the Representative Church Body cannot take them (Irish Church Act, 1869 (32 & 33 Vict. c. 42, s. 28, 38 & 39 Vict. c. 42, sections 2, 3, 4)). But there is a good charitable gift: *In re Templemoyle School* (1). The specific object does not fail, but only the machinery to carry it out: *Incorporated Society* v. *Richards* (2). The Representative Church Body is now entitled to all lands not subject to the specific life estate. The lands vest in the Representative Church Body after the death of any person having any interest in them, and not at the termination of the annuities. There is no intestacy, and the Representative Church Body, must get the surplus of the rents—otherwise Mrs. Longford would get not only the annuity intended for her, but a very large benefit not intended for her: *Doe* d. *Annandale* v. *Brazier* (3); *Cook* v. *Gerrard* (4). "After the death" of the persons named, must be taken distributively. The charitable gift must take immediate effect, otherwise the Representative Church Body must pay debts and get nothing for an indefinite time. [Counsel referred to: *Re M'Mahon, deceased* (5); *Moggeridge* v. *Thackwill* (6); *Rhodes* v. *Rhodes* (7); *Biscoe* v. *Jackson* (8); *Sonley* v. *Clockmakers' Co.* (9); *Attorney-General* v. *Master of Brentwood School* (10); *Campbell* v. *Campbell* (11); Tudor on Charities, p. 117: *Stevens* v. *Hale* (12).]

Matheson, K.C., and *Maxwell*, for Mrs. Longford:—

The bequest to the Representative Church Body is void altogether, as they cannot take the lands. "They to pay the

(1) I. R. 4 Eq. 295.
(2) 1 Dr. & W. 258, at p. 306.
(3) 5 B. & Ald. 64, at p. 68.
(4) 1 Saunders, 180.
(5) [1901] 1 I. R. 489.
(6) 7 Ves. 36, at p. 69.
(7) 7 App. Cas. 192.
(8) 35 Ch. D. 460.
(9) 1 Br. C. C. 81.
(10) 1 My. & K. 376.
(11) 1 Ir. Ch. R. 503.
(12) 2 Dr. & Sm. 22.

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debts" means that the Representative Church Body must pay them: *In re M'Mahon, deceased* (1). All the property except Foxfield is liable for the annuities, and the Representative Church Body must be postponed until the last of the annuitants dies. The heir-at-law cannot be disinherited, except by express devise or by necessary implication: Jarman on Wills (1893), vol. i., p. 498; Theobald on Wills (1905), p. 704.

Samuels, K.C., and *Boyd*, for the defendant, Clara E. Motherwell.

John Linehan, for the Attorney-General.

May 12.

BARTON, J.:—

The testator, Elliott Motherwell, was seised of a farm of Foxfield in county Cavan, containing 145 acres held in fee-simple; and of house property in Clones, county Monaghan, also held in fee-simple. The profit rent of the Clones property is said to be about £250 a year. He was also possessed of some stocks, shares, furniture, farm-stock, and implements. His debts, according to the chief clerk's certificate, amounted to £637 8*s.* 5*d.*

The testator had no children. He left a widow. His sister, Mrs. Orinda Hester Longford, was his heiress-at-law at the date of the will and of the death.

By his will he left the farm of Foxfield to his wife for life, and he bequeathed to her his furniture, farm-stock and implements. He also bequeathed to her an annuity of £100 a year. He bequeathed an annuity of £25 a year to his sister, Mrs. Orinda Hester Longford, who (as I have already mentioned) was his heiress-at-law. He bequeathed £25 a year to his cousin, Margaret Motherwell, for her life, and after her death to her niece, Eva Gildea, for her life. To a herd, Pat M'Gaughran, and his wife, Ann M'Gaughran, he bequeathed, for their lives, a house and garden which stood on the Foxfield farm, and the grass of a cow, summer and winter.

It will be observed that up to this point in his will, he has named and given life interests or annuities to six persons—his

(1) [1901] 1 I. R. 489.

wife, his sister, who was his heiress-at-law, his cousin and her niece, and the herd and his wife—also that these dispositions would apparently leave undisposed of about £100 a year out of the Clones property.

We now come to the particular clause of the will which has been the subject of this argument. It is as follows:—"After the death of these parties named in my will, and if my wife has no children of me, I give and bequeath to the Church of Ireland Representative Body all my property in Clones, county Monaghan, and Foxfield, county Cavan, for the benefit of Clones parish, diocese of Clogher, Kildrumferton, diocese of Kilmore, and Tamlaght O'Crilly, diocese of Derry, they to pay all my debts, funeral and testamentary expenses, to be divided equally between the three parishes."

It will be observed that, if the will be read in accordance with its strict grammatical sense, the two events which are mentioned, viz. (*a*) the death of the six parties named in the will, and (*b*) his wife not having children by him, must be read jointly, and the Representative Church Body are to get nothing until the last of the six persons named in the will, including the heiress-at-law and the herd and his wife, are dead.

Counsel, on behalf of Mrs. Orinda Hester Longford, the sister and heiress-at-law of the deceased, has contended for this construction, and has relied upon the rule that an heir-at-law is not to be disinherited, unless there are in the will not only words excluding the heir, but words giving the property to somebody else by express devise or necessary implication, which means such a strong probability that an intention to the contrary cannot be supposed.

On the other hand, it has been contended on behalf of the charities that if the two events upon which this property is to go to the charities be read distributively, there is, in effect, an express gift to them from and after the testator's death in the event of the testator's wife having no children by him, subject to the six life interests and annuities; and that there is enough in the will to make it so improbable as to be contrary to any reasonable supposition that the testator intended his heiress-at-law to take any part of the property devised by this clause.

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In the first place, we have the circumstance that the testator gave to his heiress-at-law an annuity of £25 a year, which indicates an intention that she should take nothing more. Upon that subject Sir M. Brady, C., said in *Campbell* v. *Campbell* (1), at p. 510:—"It may, therefore, I think, be said that the mere gift of an annuity to an heir-at-law, although indicating an intention that he should take nothing else, would not be of itself enough without something more." But we have something more, namely, the direction that the charitable devisees are to pay "all my debts and funeral and testamentary expenses, to be divided equally between the three parishes." It is immaterial whether, as a matter of law, that direction would exonerate the personal estate from its primary liability to these charges. The testator intended to throw a liability, which in the ordinary course would have to be discharged immediately after his death, upon the charitable devisees. That seems to be a powerful circumstance in favour of the view that in the event of his wife dying without children by him, he intended the charitable devisees to go into immediate enjoyment of the property which was devised to them. In view of this direction, coupled with the gift of the annuity of £25 to the heiress-at-law, I think that the context is such that the distributive construction of this devise is the obvious and natural construction.

A number of authorities have been cited. The case most in point seems to be the old case of *Cook* v. *Gerrard* (2). Some observations of Saunders, C.J., in that case at p. 186 have a special application to this particular case.

In *Cook* v. *Gerrard* (2) Sir R. Kempe was seised of certain lands in fee, and of a reversion on the death of Ruth Kempe. He devised the free use of the demesne lands to his wife for one year, and then devised the said demesne and all other his lands (including the reversion) immediately from and after the expiration of that year, and the decease of Ruth Kempe, to W. K. Grammatically W. K. took neither demesne nor reversion until after Ruth Kempe's death; and it was argued there, as here, that the heir-at-law should not be disinherited without express words

(1) 1 Ir. Ch. R. 503. (2) 1 Saunders, 180.

or necessary implication. There were circumstances to show that the testator must have intended that the heir-at-law should not take the demesne lands during the life of Ruth—circumstances not stronger, I think, than the circumstances which we have here. The Court of King's Bench held without any difficulty that the words should be read distributively, and that W. K. was entitled to the demesne lands from the death of the testator; and their judgment was approved in the Exchequer Chamber.

In the course of the arguments in *Cook* v. *Gerrard* (1) a case was relied on for the heir-at-law, at pp. 185, 186, from Moore's King's Bench Reports, in which "a man seised of a manor, parcel in demesne and parcel in service, by his will devised to his wife all his demesne lands for her life, and also by the same will devised to her all the services and chief rents for fifteen years, and further devised all the manor to another after the death of his wife; and it was adjudged that the devisee should take nothing until after the death of the wife, although fifteen years had expired, and that the heir, at the expiration of fifteen years, should have the services and chief rents during the wife's life" (2). When that case was cited, Chief Justice Saunders, at p. 186, is reported to have made the following observation, which seems to me to have a bearing upon our present case of *Keane* v. *Motherwell*:—"To which Saunders gave this answer, namely, that there the second devisee was to take nothing by the words of the will until after the death of the wife; and the words being express, no construction could be made against them, which he said was the reason of that case; but he said that if the will had been that the second devisee should have all the manor *after the expiration of the fifteen years, and after the death of the wife*, in that case it should be construed distributively as in this case, namely, that the second devisee should have the demesne lands of the manor after the death of the wife, and the rents and services after the expiration of the fifteen years." The case put by Saunders, C.J., seems to me to be very like the present case, where the words are "after the death of those parties named in my will, and if my wife has no children by me."

(1) 1 Saunders, 180. (2) Moore (K. B.) fol. 7, Case 24.

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Doe d. *Annandale* v. *Brazier* (1) and *Rhodes* v. *Rhodes* (2) are also cases upon which the Attorney-General is entitled to rely. There is a statement of the law which has often been quoted from the joint judgment of Bayley, Littledale, and Parke, JJ., in *R.* v. *Ringstead* (3), where it was laid down, "There is no doubt that, in furtherance of the manifest intention of the testator, general words which, taken in their ordinary grammatical sense, apply to the whole property devised, may be taken distributively, and that, *reddendo singula singulis*, they may be applied to that part of the property to which they appear by the context to be applicable, so as to suffer other property, to which in their grammatical sense they would apply, to pass immediately. But, in order to warrant such a construction, it must appear manifestly from the other parts of the will that that was the intention." In that case the Court thought that it was not the intention. Lord Blackburn in *Rhodes* v. *Rhodes* (2), delivering the judgment of a Privy Council which included Lord Watson, appears to have thrown some doubt on the correctness of the decision in *R.* v. *Ringstead* (3), while adopting the statement of the law which I have quoted. Lord Blackburn added: "Their Lordships do not think that to construe a particular set of words *reddendo singula singulis* is properly to be called putting on them a meaning contrary to the plain and natural sense of the words; the subject-matter and context may be such as to make such a construction the most obvious and natural construction, though probably it requires some context to justify it."

In the present case, I have no difficulty in construing the words, "after the death of these parties named in my will, and if my wife has no children of me," distributively. To the extent to which the six parties mentioned in the will were interested for their respective lives, the charitable devisees were not to take until after their deaths respectively. But if his wife had no children by him, the charities were to take the devised lands at the testator's death, subject to the six life interests.

The remaining question seems to me to be free from much difficulty. The Representative Church Body are incapable of

(1) 5 B. & Ald. 64. (2) 7 App. Cas. 192, at 217. (3) 9 B. & C. 218.

taking this gift, having regard to the provisions of the Irish Church Act of 1869, sections 22 and 28, and of 38 & 39 Vict. c. 42, section 4. But the Representative Church Body in the present case are mere trustees for the three parishes; and the incapacity of the trustees cannot defeat the testator's charitable intention in favour of the beneficiaries, which will be carried out by means of a scheme.

Solicitor for the plaintiffs: *William J. Fegan.*

Solicitors for the Representative Church Body: *Maunsell, Darley, and Orpen.*

Solicitor for Mrs. Longford: *Samuel Jones.*

Solicitors for Clara E. Motherwell: *George Bernard & Son.*

Solicitor for the Attorney-General: *Joseph E. Mac Dermott.*

W. M'G.

M. R.
1909.
March 9.

In re REILLY and BRADY'S CONTRACT.

(1909. No. 180.)

Vendor and purchaser—Will—Execution of power of revocation—Bequest inconsistent with appointment by deed with power of revocation—Doubtful title—Point of construction—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

E. R. was entitled for life to a house and lands at Lower Fennor, with power to appoint them to his children. In 1887 he conveyed the premises to a trustee for his eldest son, E., charged with sums for his sons, M. and J., and his daughter, N., payable at twenty-one or marriage. The deed contained a power of revocation.

The deed was not acted on; E. emigrated to Australia; M. died under age; N. lived in England; J. alone resided with his father on the premises.

In 1902 E. R. made a will in favour of his son J., in the following terms:—"I, E. R., of Lower Fennor, bequeath my house and lands and all my property to my son J." He had no other house save that in which he resided at Lower Fennor. J. succeeded to the premises on his father's death in the same year, and remained in possession until his death in 1906, when his widow succeeded to the premises under his will. In 1909 she sold the premises to B.

B. objected to complete the purchase, on the ground that the deed of 1887 was not revoked by the will of 1902, and that a good title was not shown.

Held, that the will operated as a revocation of the appointment made by the deed and a new appointment of the premises, and that a good title was shown.

Observations as to the duty of the Court in deciding questions of title as between vendor and purchaser.

Summons.

This was an application under the Vendor and Purchaser Act, 1874. The facts of the case were as follows:—

On December 7th, 1908, Margaret Reilly, the vendor, put up for sale by auction, subject to conditions of sale, her farm at Fennor Lower and Fennor Upper, in the barony of Fore and county of Meath, consisting of two holdings, the largest of which contained 82 acres, 2 roods, or thereabouts, statute measure, situate in the townland of Fennor Lower, and held as a present tenancy

under Gustavus Tuite Dalton, at the yearly rent of £58 2*s.* 9*d.*, but in respect of which a purchase-agreement had been entered into under the provisions of the Land Purchase Acts, and a smaller holding containing 20 acres, or thereabouts, statute measure, situate partly in the townland of Fennor Lower, and partly in the townland of Fennor Upper, held as a present tenancy under J. L. Adlercron, at the yearly rent of £15.

Peter Brady purchased the entire farm for the sum of £2000, and paid a deposit of £500. The title to the larger holding, which alone was in question, as stated in the abstract of title, was as follows :—

By lease dated January 30th, 1836, Gustavus Dalton demised to Edward Reilly that part of the lands of Lower Fennor, containing 82A., 2R., 3P., statute measure, or thereabouts, situate in the barony of Fore and county of Meath, for the term of three lives, therein mentioned, or for the term of thirty-one years, subject to the yearly rent of £85 0*s.* 6*d.*

Edward Reilly, the lessee, by his will, dated August 25th, 1855, bequeathed the residue of his property, real and personal, to his son, Edward, for life, and after his death to be disposed of to and amongst his children (if any) as he should think fit. The testator died on 23rd December, 1857, and thereupon his son, Edward, entered into possession and receipt of the rents and profits of the lands, which formed part of the testator's residuary estate, and remained in such possession and receipt until his death. On 1st May, 1858, this will was proved by George O'Neill, one of the executors therein named. On 3rd May, 1889, an order was made by the Irish Land Commission, declaring that Edward Reilly (son of Edward Reilly the lessee) was to be deemed a tenant of a present tenancy in the lands pursuant to the Land Law (Ireland) Act, 1887, and it was thereby determined that the fair rent of the said holding was £67. By indenture of 10th May, 1894, the said Edward Reilly mortgaged the lands to Thomas Carberry to secure repayment of the sum of £200, with interest at 5 per cent.

On 3rd May, 1902, the said Edward Reilly (afterwards called Edward Reilly, junior) made his will in the following terms :— "I, Edward Reilly, of Lower Fennor, in the name of God do

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declare this to be my last will and testament. I will and bequeath my house and lands, and all my property, to my son John; and my wife Maria is to have the use of the house, and to be allowed to live in it in peace and comfort during her lifetime, and in case she should leave she is to receive some money which will maintain and support her comfortably. I also desire that my lawful debts be paid, especially the money due Thomas Carberry, Clonard, about £260; and I hereby appoint Patrick O'Reilly, of Oldcastle, my sole executor."

On 25th May, 1902, the said Edward Reilly died, and his will was proved on 8th August, 1902, by the said Patrick O'Reilly. In November, 1902, Thomas Carberry reconveyed the lands to John Reilly, who mortgaged them to the Northern Bank. In 1903, the landlord of the lands agreed to sell them to John Reilly under the Land Purchase Acts. John Reilly, by his will, dated 10th May, 1906, bequeathed his farm in Fennor Lower and Fennor Upper to his wife, Margaret Reilly (the vendor), subject to certain provisions in favour of his mother, Maria Reilly. John Reilly died on 8th June, 1906, and on 10th August, 1906, his will was proved by John Carolan and Thomas Reilly, the executors therein named.

The conditions of sale provided that the purchaser should admit that the bequest contained in the will of Edward Reilly, junior, of "my house and lands and all my property to my son John," was a good execution of the power of appointment over the larger holding vested in Edward Reilly, junior, by the will of his father, Edward Reilly, senior, and should not require the concurrence of any person who could claim in default of appointment. The executors of John Reilly, Maria Reilly, and the Northern Bank agreed to join in the conveyance. The investigation of the title proceeded, and was nearly completed, when on 19th January, 1909, it came to the knowledge of the vendor's solicitor that Edward Reilly, junior, had executed a deed of trust dated 5th April, 1887. The parties to this deed were Edward Reilly, described in the deed as Edward O'Reilly, senior, of the first part, William Tuite of the second part, and Edward Reilly, eldest son of the said Edward Reilly, described therein as Edward O'Reilly, junior, of the third part. By this deed, after reciting the

lease of 1836, and that two of the lives therein mentioned were still living, Edward O'Reilly, senior, in consideration of his natural affection for his son Edward O'Reilly, and for his children, Marcella O'Reilly, Michael O'Reilly, and John O'Reilly, demised to William Tuite the lands comprised in the said lease to hold for a term of 999 years upon the trusts thereinafter expressed, that is to say, upon trust for his son Edward, subject to a charge of £80 each for his children, Marcella, Michael, and John, payable on attaining twenty-one, or marriage, and subject to the use of 8 acres of the lands and a room in the house by Edward Reilly, senior, and his wife, during their lives, and the life of the survivor. By this deed Edward O'Reilly, senior, assigned other lands (which he sold in 1889), and his household furniture and live and dead stock mentioned in a schedule to the deed on the same trusts, and Edward O'Reilly, junior, covenanted to pay the rent reserved by and perform the covenants in the lease of 1836, and to support Marcella, Michael, and John in the house until payment to each of them of the said sum of £80, and to allow Edward O'Reilly, senior, and his wife to have the use of the said lands and room, and the furniture therein. It was thereby declared that Edward O'Reilly might at any time, by deed or will, either alter or revoke all or any of the trusts thereby declared, and by the same or any other deed or will declare such other trusts as he should think fit. The deed was duly registered on 19th April, 1887.

A copy of this deed was furnished to the solicitor for the purchaser, with a statement that it had never been acted on, that Edward Reilly, the eldest son, had gone to Australia more than twenty years ago, and had never made any claim under the deed, and was thirty-seven years of age; that Michael Reilly died aged sixteen years, and that Marcella Reilly, who was now aged thirty-five years, had left the place, and was now residing in Liverpool. The purchaser was advised that, having regard to the existence of this deed, he could not safely complete the purchase, and on his persisting in his objection a summons was taken out by the vendor to have it declared:—

(1) That the requisitions and objections of the said Peter Brady in respect of the title had been sufficiently answered by the vendor.

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(2) That the power of appointment contained in the will of Edward Reilly, senior, dated 25th August, 1855, was not duly exercised by the trust deed of 5th April, 1887.

(3) In the alternative that the said trust deed was revoked by the will of Edward Reilly, junior, dated 3rd May, 1902.

(4) That the said Peter Brady was precluded by the conditions of sale from making or raising any objection to the will of the said Edward Reilly, junior, as a good appointment to John Reilly, under whom the vendor claimed.

(5) That a good title to the said lands had been shown in accordance with the particulars and conditions of sale, and that the said Peter Brady might be ordered to pay the costs of the application.

The application was supported by an affidavit of Robert L. Brown, solicitor for the vendor, verifying the above facts.

It appeared from this affidavit that Edward Reilly, junior, resided in a house situate on the larger holding, and that there was no house on the smaller holding, and that he was not at the time he made his will, nor at his death, entitled to any house, or any lands, save the premises comprised in the contract, and a plot of ground then forming part of the smaller holding, subsequently acquired by the Oldcastle Rural District Council for the purposes of the Labourers Acts; and Mr. Brown also stated that he had been informed that Edward Reilly was in financial difficulties when he executed the deed, but there was no evidence as to this.

Meredith, K.C. (with him *Donaldson*), in support of the summons :—

It is, perhaps, doubtful whether the deed of 1887 was an exercise of the power of appointment in the will of Edward Reilly; it does not recite the power, it refers to the property; but the reservation in favour of the wife, after the death of her husband, is inconsistent with the power of appointment, which was in favour of the children. Further, the deed was not acted on, nor it appears

meant to be acted on. Assuming, however, that the deed operated as an exercise of the power of appointment, it contained a power of revocation; and the question is, did the will of Edward Reilly, of 3rd May, 1902, operate as a revocation of that appointment, and as a new appointment? The will does not refer to the power, but there is a sufficient reference to the property, the subject of the power. If the testator had said, "my house and land at Lower Fennor," there could have been no question, as that would answer the description of the property mentioned in the will of Edward Reilly, senior, and the bequest of "my house and land" was a bequest of his house and land at Lower Fennor. He describes himself as of "Lower Fennor," and he had no other house except the one in question. If it was not a bequest of the house and land at Lower Fennor, then the bequest had nothing to operate on. There is thus a reference to the property in the will, and further a disposition of such property inconsistent with the disposition in the deed, so both cannot stand together. The same principles that apply to powers of appointment apply to powers of revocation; if, therefore, a man has power to revoke existing uses and limit new uses, and he afterwards, by his will, devises all his lands, having no others than those subject to the power of revocation, they will pass: Farwell on Powers (1893 ed.), p. 209; *Deg* v. *Deg* (1); otherwise, if there is other property to which the will can refer: *Pomfret* v. *Perring* (2). A power of revocation may be executed by implication: Theobald on Wills (1908 ed.), p. 251. In *Quin* v. *Armstrong* (3), Sir Edward Sullivan says, at p. 168 of the report:—"It is not necessary for a man who has executed a voluntary deed, with a general power of revocation, to make an express revocation of it. It is a sufficient revocation within the power if he makes a disposition of the estate inconsistent and which cannot stand with the voluntary deed."

Molony, K.C., for the purchaser.

The purchaser objects to complete on account of the existence of this deed of 1887, which was only disclosed to him when he was ready to close, and which would not have appeared on the

(1) 2 P. W. 415. (2) 5 D. M. & G. 775. (3) Ir. R. 11 Eq. 161.

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result of the search, as it was against Edward Reilly, not Edward O'Reilly. The purchaser does not wish to buy a lawsuit, which might be brought by someone claiming under the deed of 1887. That deed was intended to be an execution of the power of appointment, although it reserved benefits to the wife after his death which were in excess of the power. It must be shown that Edward Reilly not only made a new appointment by his will, but also that he revoked the previous appointment: *In re Wells' Trusts* (1).

The title is at least doubtful, and should not be forced on the purchaser. *In re Maguire and M'Clelland's Contract* (2) was a different case; there the Court of Appeal held that the claims of the next-of-kin were barred by the Statute of Limitations. Here the eldest son's claim is not barred, as his father only died in 1902. The Judge in the exercise of his jurisdiction under the Vendor and Purchaser Act, 1874, is to make such order as is just. It would not be just to force such a title on a purchaser. There is no reference in his will to the power, nor to the property the subject of it. The devise is general: the testator says, "my house and lands," not "my house and lands of Lower Fennor." It might refer to any house he had elsewhere either at the date of the will or at the time of his death. The Court is asked to decide a point of construction arising upon the meaning of an ill-expressed instrument. In such a case the Court will refuse to decide the construction in favour of the vendor, and will declare the title too doubtful to be forced on the purchaser: *Alexander* v. *Mills* (3). Besides, the purchaser might be exposed to litigation if Edward Reilly came home, and the title should not be forced upon him on that ground: Williams on Vendor and Purchaser, p. 1007, where the decisions are classified.

Meredith, K.C., in reply:—

The only question is, has the vendor a good title? The Court must determine that, and decide the doubt, if there is a doubt. It is a question of construction. The condition of sale was framed to preclude the purchaser from objecting that the will was not an

(1) 42 Ch. D. 646. (2) [1907] 1 Ir. R. 393. (3) L. R. 6 Ch. App. 124.

execution of the power. At that time the existence of the deed was not known, but the mere knowledge of the deed was not material. A purchaser when he buys does not know of the existence of the particular title-deeds which make up the title.

The vendor must show that the bequest in the will is specific; if it was a general bequest, it would not be an exercise of the power, even if there had been no deed of 1887. The testator says: "I, Edward Reilly of Lower Fennor." That means the place where he lives. He had no other house except the house at Lower Fennor where he lived. If the will specifically bequeaths the lands in the lease of 1836, the vendor must succeed, for the will is then inconsistent with the deed of 1887, and it can only operate by way of revocation and new appointment. In *In re Brace* (1) North, J., states the principle as to the revocation of existing and the declaration of new uses. It can be done by the use of words which can take effect only if a revocation of the old uses is implied. The Court must decide whether the title is good or bad. In *Biron's Contract* (2) the Court of Appeal in Ireland forced the title on the purchaser. The question there was as to the meaning of the word "issue" in a settlement.

Sir George Jessel states the rule in *Osborne* to *Rowlett* (3); he agrees with what the Court of Appeal decided in *Alexander* v. *Mills*, (4) that it was incumbent on the Court to decide questions of law between vendor and purchaser. There are no doubtful facts here: the question to be decided is, whether the rule as to the exercise of a power of revocation stated by Farwell applies—in other words, whether the premises comprised in the lease of 1836 passed under the will. *In re Guyton and Rosenberg's Contract* (5) was a case of the construction of a devise in a will, and the title was forced on a purchaser.

THE MASTER OF THE ROLLS:—

The first question I have to determine is—What is my duty in a case under section 9 of the Vendor and Purchaser Act, 1874. If I were dealing with a summons under the ordinary jurisdiction

(1) [1891] 2 Ch. 671.
(2) 1 L. R. Ir. 258.
(3) 13 Ch. D. 774.
(4) L. R. 6 Ch. App. 124.
(5) [1901] 2 Ch. 591.

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conferred upon me by the Judicature Act and Rules, I should certainly decline to entertain the consideration of the question of construction of the will of Edward Reilly executed on 3rd May, 1902, in the absence of his son Edward Reilly. But it is contended that I am bound by the Vendor and Purchaser Act, and by the decisions under that Act, to definitely make up my mind one way or another as to the true construction and effect of the will of 1902, and, if I arrive at a conclusion in favour of the vendor, to force the title on the purchaser, who is a willing purchaser, in a sense, but who declines to accept a lawsuit instead of a farm, and the possibility of an invasion from Australia in substitution for possession of the peaceful pastures of Meath referred to in the conditions of sale. There was a time when the Courts were very slow to force upon a purchaser a title which might in certain events involve litigation. But Sir George Jessel in *Osborne* to *Rowlett* (1) felt himself coerced to decide in a particular manner a question which could not be said to be free from doubt, owing to the fact that *Cooke* v. *Crawford* (2) was a decision apparently the other way. The words of section 9 are:—"The Judge shall make such order as to him shall appear just." Sir George Jessel says, at p. 780 of the report:—"The case is one which I am bound to decide, as between vendor and purchaser, whether a good title can be made or not. Though I entirely agree with what the Court of Appeal decided in *Alexander* v. *Mills* (3), that it is incumbent on the Court to decide questions of law between a vendor and a purchaser, yet it must be borne in mind that any such decision does not technically bind anyone else but the parties actually before the Court, and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title. I cannot help saying that in the interests of the purchaser, who has a right to be protected, the old rule was the best, namely, that a doubtful title ought not to be forced upon a purchaser. The present rule may be right, but it is not creditable to our law that the Court should not decide so as efficiently to protect the purchaser. . . . The result is, that I feel myself compelled to decide in this case whether this is a good title or not."

(1) 13 Ch. D. 774. (2) 13 Sim. 91. (3) L. R. 6 Ch. App. 124.

Now, with regard to *Alexander* v. *Mills* (1), thus dealt with by Sir George Jessel, it is curious that Mr. Meredith claimed that case as an authority in his favour, and Mr. Molony on the other hand relied on it in support of his argument. I am not surprised. The decision is not a cast-iron one to the effect that the Court *must* decide all questions of law arising between vendor and purchaser. James, L.J., expressly says at p. 131 of the report:—"We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court would not, on its own view, compel a purchaser to take a title; still, as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist, not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument." Then the language of Christian, L.J., in the case of *In re Biron* (2) is appealed to. He says at p. 268:—"I ask, could that 'doubt,' if there was any, survive the decision now made by the three Judges of this Court? If some grand-child disputed this title later, could any Judge, no matter how crotchety, disregard our decision? Both these objections are, therefore, in my opinion, unfounded"; and yet in that case the Vice-Chancellor of Ireland had declined, in the absence of grand-children, to express an opinion as to the meaning of the word "issue" in the settlement. I feel rather inclined to think that the view of Lord Justice Christian really was that any purchaser would be safe if he acted on a decision of the Court of Appeal, but not otherwise.

This view places a Court of first instance—myself in this case—in a position of difficulty in deciding on the meaning of the words of a particular instrument. If I refrain from giving my opinion, in the absence of anyone claiming under the deed of 1887, the cases appear to establish that I neglect my duty. If I interpret the will to the best of my ability, I seem to be carrying

(1) L. R. 6 Ch. App. 124. (2) 1 L. R. Ir. 258.

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out the view of the law expressed in *Alexander* v. *Mills* (1) and enforced by Sir G. Jessel in *Osborne* to *Rowlett* (2). Still I am deciding the case in the absence of persons who may be vitally interested in the decision. But my duty is clear. If I arrive at the conclusion that the will is a doubtful and difficult instrument, ill-drawn and ambiguous in expression, then the exception referred to by James, L.J., ought to lead me to make the order which under such circumstances would appear just, namely, that the vendor had not established his title to my satisfaction. But I do not think that there is any real doubt about this will. I hold that, viewed in the light of the circumstances of the case, the will of 1902 operated as a revocation of the appointment made by the deed of 1887, and a new appointment (in favour of the testator's son John) of the premises comprised in the lease of 1836. The principles of law relating to powers of revocation and new appointment are perfectly clear. Perhaps the best statement of those principles will be found in the case of *Pomfret* v. *Perring* (3). The views of the Lords Justices (expressed in a few brief sentences) describe the principles on which the Court should act. Knight Bruce, L.J., says at p. 780:—"I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say, that they exhibit of themselves an intention to exercise the power of revocation. But if the will shows an intention to have existed, which, without so construing them, cannot be so effectuated, they may be certainly so construed." Turner, L.J., says: "The principles acted on in other cases, with respect to the exercise of powers, seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it

(1) L. R. 6 Ch. App. 124. (2) 13 Ch. D. 774. (3) 5 D. M. & G. 775.

would be different, and the general words would be then held to be an exercise of that power. I think it is clear that an intention must be shown to revoke and undo what has been already done." Mr. Molony referred to the decision of Stirling, J., in *In re Wells' Trusts* (1). Having referred to *Pomfret* v. *Perring* (2), the learned Judge there says, at p. 655:—"It appears therefore, that, in the words of Turner, L.J.; 'the intention to revoke and undo what has been already done' may either appear by the express terms of the instrument, or be inferred from the circumstance that the will would be otherwise ineffectual. This agrees with what is laid down by Lord St. Leonards in the passage cited from his treatise on powers: see Sugden on Powers (8th ed. 290); and by Lord Cairns in *Cooper* v. *Martin* (3). The foundation, however, for such inference is this: that no other explanation can be given of the language used by the donee of the power." I see nothing in that decision of Stirling, J., indicating any departure from the views of the Lords Justices in *Pomfret* v. *Perring* (2), and I see nothing in the extracts from text-books which have been cited to lead me to suppose that *Pomfret* v. *Perring* (2) is not still the guiding authority on the question under consideration.

Let me now come to this very short will:—[The Master of the Rolls read the will.] What were the house and lands which came within the description of "my house and lands" in the will? The testator, who describes himself in the will as "of Lower Fennor," and who had no other house save the house in which he resided on the lands of Lower Fennor, comprised in the lease of 1836, had described himself in a mortgage deed made between him and Thomas Carberry, dated May 10th, 1894, as "Edward O'Reilly of Lower Fennor." The deed recited an order fixing a fair rent in respect of the lands, and that Thomas Carberry had agreed to lend Edward O'Reilly the sum of £200 on the security of what was at the time a statutory tenancy. Edward O'Reilly then proceeds "as beneficial owner" to assign to Thomas Carberry the lands and premises comprised in the lease of 1836, and to charge them with repayment of the mortgage debt. In the will the testator refers to this very debt.

(1) 42 Ch. D. 646. (2) 5 D. M. & G. 775. (3) L. R. 3 Ch. App. 56.

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Under these circumstances, can there be a doubt that by the term "my house and lands" in his will the testator meant the house and lands comprised in the lease of 1836, in the fair rent order, and on which he had borrowed money from Thomas Carberry, to whom he says in his will he owed £260, and, accordingly, the premises comprised in the deed of 1887? In my judgment there can be no doubt upon the point. His will was in truth the last of a long series of acts manifestly intended to set aside the appointment made by the deed of 1887. Under all the circumstances of the case, I come to the conclusion that the testator in effect says: "I bequeath the house and lands held under the lease of 1836, dealt with by the deed of 1887, in respect of which I have had a fair rent fixed, and which I have mortgaged to Thomas Carberry, to my son John." If the will does not mean that, the bequest can have no operation or effect. But holding as I do, that the bequest means what I have said, the deed of 1887 must go; and the will operates as a revocation and new appointment. I must therefore, answer the third question by saying that the trust deed of 1887 was revoked by the will of Edward Reilly.

The following order was made:—

The Judge being of opinion that the said will of Edward Reilly, probate of which was granted as aforesaid on the 8th day of August, 1902, did operate as a revocation of the appointment contained in the deed of trust dated the 5th day of April, 1887, referred to in the said affidavit of Robert L. Brown, and was a new appointment of the premises described in a lease dated the 30th day of January, 1836, to John Reilly, the testator's son, and the said Margaret Reilly, by her counsel, undertaking to have a statutory declaration made by her and William Tuite verifying the statement of facts contained in the said affidavit of Robert L. Brown, the Judge doth declare that the said trust deed of the 9th day of April, 1887, was revoked by the said will of Edward Reilly, dated the 3rd day of May, 1902, and proved on the 8th day of August, 1902, and that a good title to the said lands, the subject-matter of the contract in the title hereof, has been shown in accordance with the particulars and conditions of sale; and by consent the Judge doth declare the said Peter Brady entitled to his costs of this application, and order to be paid by the said Margaret Reilly when taxed and ascertained, and doth certify for counsel.

Solicitor for the vendor: *Robert L. Brown.*

Solicitor for the purchaser: *L. C. P. Smith.*

W. L.

NATIONAL BANK *v.* DIFFELY.

(1908. No. 955.)

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July 16.
Nov. 18.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54 (3)—*Holding subject to land purchase annuity—Restriction on mortgaging—Equitable mortgage by deposit of title-deeds.*

Section 54, sub-section 3, of the Irish Land Act, 1903, is confined to instruments of mortgage or charge, and does not apply to an equitable deposit of title-deeds unaccompanied by any writing.

Trial of Action.

This action was brought against Patrick Diffely, Michael M'Cormick, and Alexander Knox M'Entire and Martin Fitzgerald the official and creditors' assignees of John M'Cormick, a bankrupt—(1) to have an account taken of what was due to the plaintiffs for principal, interest, and costs on foot of an equitable mortgage of a plot of ground with buildings thereon, situate at the cross-roads in the townland of Cloonfad, parish of Kiltullagh, county of Roscommon, containing 3 roods and 7 perches statute measure (1 rood 27 perches Irish), made by John M'Cormick in favour of the plaintiffs on August 10th, 1904, and on foot of a mortgage of the said lands and premises, dated January 4th, 1907, made by John M'Cormick to the plaintiffs, and that the said mortgages might be enforced by sale; (2) to have it declared that an indenture of lease dated December 7th, 1907, and purporting to be made between the defendant, Michael M'Cormick, of the first part, the said John M'Cormick, of the second part, and the defendant Patrick Diffely, of the third part, of a messuage and licensed house in Cloonfad in the said county being portion of the premises comprised in the said mortgages) for a term of fifteen years at the yearly rent of

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£50 was null and void, and should be set aside and delivered up to be cancelled.

The facts of the case material to the report were as follows:—

John M'Cormick, the bankrupt, held the premises in question under a lease of September 4th, 1878, from Hannah Charlotte O'Beirne, for the term of thirty-five years, from May 1st, 1878, subject to the yearly rent of £2. There were a dwelling-house and a licensed public-house on the plot of ground. On May 6th, 1904, John M'Cormick signed an agreement to purchase the premises comprised in the lease from the lessor under the Irish Land Act, 1903, through the Irish Land Commission, for the sum of £15, repayable by a purchase annuity of 9*s.* 10*d.* On August 15th, 1904, John M'Cormick deposited, by way of equitable mortgage, the lease with the plaintiffs at their Dunmore branch in the county of Galway, to secure payment of all sums then due by him to the plaintiffs, and also all such sums as should thereafter become due from him to them, together with interest at £6 per cent. per annum. No writing accompanied the deposit of the lease. On December 6th, 1906, the Land Commission, in pursuance of the agreement of May 6th, 1904, vested the said premises in John M'Cormick, as owner in fee-simple, by a vesting order of that date. On January 4th, 1907, John M'Cormick executed a legal mortgage by way of sub-demise to the plaintiffs of the premises comprised in the lease, to secure payment of the balance on account from time to time due by him to them, without prejudice to the said equitable mortgage. On October 14th, 1907, John M'Cormick assigned the premises to the defendant Michael M'Cormick. On December 7th, 1907, Michael M'Cormick, with the approval and at the request of the said John M'Cormick demised the messuage and licensed house as then in the occupation of John M'Cormick, but not including the dwelling-house and garden attached thereto adjoining the licensed premises, to Patrick Diffely, for the term of fifteen years, subject to the yearly rent of £50. This lease was made without the consent of the plaintiffs, and they had not consented in writing to it. On January 14th, 1908, John M'Cormick was adjudicated a bankrupt, and the defendant, Martin Fitzgerald, was appointed creditors' assignee in the matter. The lands comprised in the

vesting order were, pursuant to the Local Registration of Title (Ireland) Act, entered on the folio No. 6150, of the register for the county of Roscommon, and John M'Cormick, was registered as owner in fee-simple of the said lands, subject to an annuity of 9*s.* 10*d.*, commencing to run upon June 1st, 1907, and payable half-yearly to the Irish Land Commission, until an advance of £15 should have been repaid, and subject also to the said mortgage to the plaintiffs of January 4th, 1907. The mortgage was entered on the register as being subject to the limitations imposed by section 54 (3) of the Irish Land Act, 1903.

The writ was issued on November 6th, 1908. Diffely entered an appearance, but intimated that he did not intend to defend the case as to the lease made to him. A statement of defence was put in by the assignees in bankruptcy, by which the following defences were raised with regard to the deposit of the lease—(1) that the deposit of the lease created no charge on the premises, having regard to the prior agreement to purchase which resulted in a sale; (2) that even if the deposit created a valid charge, the limitation on mortgaging imposed by section 54 (3) of the Land Act of 1903 attached from the date of the signing of the agreement to purchase, and the deposit was only good as a charge for the sum of £4 18*s.* 4*d.*, being ten times the amount of the said purchase annuity; and (3) that if the said limitation did not attach until the date of the vesting order of December 6th, 1906, the said charge was only valid for the amount then due to the plaintiffs, and that it was void as regards any subsequent advances.

The action came on for trial on July 16th, 1909, and for further hearing on November 18th, 1909.

The only question which calls for a report was whether an equitable deposit of title-deeds without writing was within section 54 (3) of the Irish Land Act, 1903.

Herbert Wilson, K.C., and *R. Doyle*, for the plaintiffs :—

This sub-section is the first statutory provision restricting a tenant-purchaser from mortgaging his holding; if the sub-section stopped at the word "advance," an equitable mortgage

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by deposit without writing would be within it, but the subsequent words, "instrument of mortgage or charge" should be referred back to explain the words "mortgage or charge" in the earlier portion of the sub-section, and show that it only applies to a mortgage or charge created by an instrument, i.e. by writing. The word "instrument" is used instead of "deed" to bring in a charge created by a will. In the Conveyancing Act, 1881, s. 2 (xiii), "instrument" includes a will, and in section 3 (3) of the same Act the word "instrument" occurs twice with reference to abstracts of title. Sub-section (4) of section 54 provides for the registration of "every instrument of mortgage or charge," under the Local Registration of Title (Ireland) Act, 1891, within three months from the date of "execution." That word is only applicable to an instrument. The time for registration of a charge created by a will or codicil was limited by the sub-section to six months from the death of the testator. This was amended by the Irish Land Act of 1907, section 2 (1), to twelve months from the date of the grant of probate of the will or letters of administration with the will annexed.

It has been recently decided by Wylie, J., in *In re Roulston* (1) that this sub-section does not apply to a judgment mortgage. A covenant by a lessee not to mortgage is not broken by a deposit of the lease, even though accompanied by a letter that the depositee shall have a lien thereon by way of equitable mortgage: *M'Kay* v. *M'Nally* (2).

Fetherstonhaugh, K.C. (with him *Powell, K.C.*, and *Devitt*), for the defendants, M'Entire and Fitzgerald.

M'Kay v. *M'Nally* (2) is not in point. It was discussed in *Simmons* v. *Montague* (3) in this Court. The mere deposit of the lease created a charge on the property comprised in it: *Bank of New South Wales* v. *O'Connor* (4); *Gilligan* v. *National Bank* (5).

(1) [1909] 1 Ir. R. 306.
(2) 4 L. R. Ir. 438.
[1909] 1 Ir. R. 87.
(4) 14 A. C. 282.
(5) [1901] 2 Ir. R. 513.

The words "shall not" are equivalent to "it shall not be lawful": *Fogarty* v. *Shanahan* (1), decided on the same words in the Land Act of 1881, section 2. If the sub-section stopped with the word "advance," this deposit would be within the word "mortgage" as well as the word "charge." The policy of the statute was to prevent the proprietor creating charges on his holding, and the subsequent words do not qualify the previous prohibition. Sub-section (4) is not against this contention, as a deposit without writing could not be registered. The effect of a compulsory sale under section 55 is to discharge the holding from all claims and incumbrances, which would include an equitable mortgage by deposit without writing.

Wilson, K.C., in reply:—

If the second clause of the sub-section does not limit the first clause, a mortgage by deposit without writing would be void altogether, whereas an instrument of mortgage or charge would be void only as to the excess. After the tenant has become proprietor he cannot make a deposit of title-deeds, as the land certificate, which is the evidence of title, is always retained by the Land Commission till the annuity is paid off, so that this case cannot be one of general application.

THE MASTER OF THE ROLLS:—

I was at first inclined to think that my decision in this case might be a far-reaching one, affecting many banks and numerous tenant-purchasers, but on consideration I think that a case like the present is not likely to arise frequently, if at all. The original land certificate is always retained by the Land Commission until the proprietor of the holding, or some one claiming under him, pays off the purchase annuity, so the proprietor cannot deposit it to secure an advance. As at present advised, I do not think that any Court is likely to hold that the deposit of a copy of a certificate could be of any avail to a bank as a security for money lent. But that is not the question here. What I must

(1) [1896] 2 I. R. 273.

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decide is, what is the true construction of clause 3 of section 54 of the Land Act of 1903. The lease, which was deposited with the Bank by John M'Cormick, the bankrupt, was a lease to him of "a plot of ground, with the buildings thereon, situate at the cross-roads in the townland of Cloonfad, county of Roscommon, containing one rood and twenty-seven perches, Irish plantation measure," for the term of thirty-five years, at the rent of £2. Under that modest description of parcels lies the solid fact that there was a public-house built upon the plot of ground—a public-house conveniently situated at the cross-roads, admitted for the purpose of this action to be value for at least £900. The Bank claim to have "evaded" the provisions of the Land Act of 1903 (section 54) by taking an equitable charge, a mere deposit of title-deeds without writing, and advancing money on the faith of that deposit. I need hardly say that I use the word "evaded" in the "perfectly innocent" sense of which it is capable: see the judgment of the House of Lords in *Bullivant* v. *Attorney-General for Victoria* (1). If the Bank is right in its contention, there is due to it (subject to an account being taken) the sum of £589 3*s*. 8*d*. for principal and interest. Now, what is the nature, and what are the consequences, of a charge so created? In *The Bank of New South Wales* v. *O'Connor* (2), Lord Macnaghten says, at p. 282:—"It is a well-established rule of equity that a deposit of a document of title, without either writing or word of mouth, will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit." The result may or may not be a contract to execute a legal mortgage, but there may be cases in which all the person can give is an equitable charge. In *Gilligan* v. *National Bank* (3), Madden, J., says, at p. 529:—"It is plain that the rights and responsibilities of mortgagor and mortgagee respectively in relation to title-deeds are the same in the case of an equitable mortgage by deposit as in that of a legal mortgage by deed." Before the Land Act of 1903, an individual, having an interest in land as tenant-purchaser, was entitled as of right to charge his interest with the repayment of moneys borrowed by

(1) [1901] A. C. 196. (2) 14 A. C. 273. (3) [1901] 2 Ir. R. 513.

him. There was, at all events, no statute which precluded him from borrowing money from a bank on the security of a deposit of title-deeds (see *per* May, C. J., *Flood's Estate*, 7 L. R. I., at p. 552), and everyone knows that many farmers throughout Ireland could not have struggled through bad times but for the way in which the banks advanced money to them on deposit of title-deeds. It was also well known that a creditor had a method afforded him by statute of obtaining a charge against his debtor's interest in land, by proceeding at law to obtain a judgment, and then registering that judgment as a mortgage against the lands of the debtor. It was for the legislature to say whether these more or less indirect methods of obtaining charges on land should continue available in the case of tenant-purchasers. Now in 1903 the question of mortgages and charges was dealt with and the legislature enacted that in the case of the proprietor of any holding for the purchase of which the Land Commission, after the commencement of the Act, made any advance under the Land Purchase Acts, "the proprietor shall not, without the consent of the Land Commission, mortgage or charge the holding, or any part thereof, for any sum or sums exceeding in the aggregate ten times the amount of the purchase annuity payable in respect of the holding or part upon the making of the advance"—I pause there, because the argument of Mr. Fetherstonhaugh as to the motive in the mind of the legislature might lead one to guess, if guessing were permissible, that the origin of that clause was, that the holding, while it remained subject to any advance payable to the State, should not be burdened by any act or default of the purchaser with more than ten times the amount of the purchase annuity. But the question I have to decide is, what is the expressed intention of the legislature, not what was the motive in the mind of the legislature. The landlord of this plot of ground sells it, and the tenant buys it, and the Land Commission advances the purchase-money of the holding as if it were an agricultural or pastoral holding, and a sum of £15 of public money is advanced to the tenant to enable him to become the proprietor in fee-simple of this public-house, and that advance of £15 is made repayable to the State by an annuity of nine shillings and tenpence payable half-

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yearly to the Land Commission. If what I have read of this section 54 (3) is to have the following effect, namely, as if a full stop were placed after the word "advance," the owner of this public-house, which is worth £900, could only mortgage or charge the holding to the extent of ten times nine shillings and tenpence, that is £4 18*s.* 4*d.*, without the sanction of the Land Commission! No doubt one cannot construe an Act of Parliament by a single grotesque case. I have always held that it is much better to construe an Act of Parliament by the terms in which it is couched, rather than to set about finding avenues of escape from its plain provisions, however strange they may be. Of course when you come to read a section of an Act of Parliament in connexion with a code, you have to consider the effect of previous legislation. Hence the consideration of cases which come within the Irish Land Acts may involve one in what I may term a forensic maze. But this sub-section (3) of section 54 is a new departure in legislation. The first observation to be made on this sub-section is that the judgment mortgage was left untouched. If the legislature had in mind the desirability of protecting the holding of a proprietor from being liable for charges exceeding in all ten times the amount of the purchase annuity, the result has been that judgment mortgages have escaped the net. In the recent case of *In re Roulston* (1), Wylie, J., held that this sub-section did not extend to a judgment mortgage, but only affected a mortgage or charge created by the proprietor of the holding. He says (p. 310):—"In my opinion, therefore, section 54 (3) only extends to a mortgage or charge by the voluntary act of the proprietor, and does not invalidate a judgment mortgage, no matter what the amount of the prior charges on the holding may be." No doubt there is a difference between involuntary and voluntary acts, so far as individuals are concerned; but, so far as the State is concerned, if judgment mortgages are outside the section, I see no reason why mortgages or charges by way of equitable deposit should not be outside, and in fact I hold on the true construction of the section that such mortgages or charges, if unaccompanied by any writing, have also

(1) [1909] 1 Ir. R. 306.

escaped the net. It may seem strange that a man should not be allowed to burden his holding with more than ten times the amount of his purchase annuity, by an instrument *inter vivos* or by will, and yet be allowed to go into a bank and by making a deposit of deeds burden his holding with more than that amount; but it must be remembered that this is a section which purports to deprive a man of his ordinary rights as a citizen to raise as much money as he can on the security of his interest in his own holding, and the Court is bound to examine carefully the language of the section in order to ascertain how far the legislature has gone. In the absence of clear language bringing any particular case within the section, the Court should hold its hand. Intention, even the best intention, if not expressed in a statute, is not legislation. In the present case I hold that the true construction of the section in question is not to be arrived at by stopping at the word "advance." The words immediately following that word must be read in connexion with the preceding words. The words following "advance" are "and every *instrument* of mortgage or charge on a holding or part thereof by which the holding or part is charged with any larger sum shall be null and void as to the excess." Sub-section (4) uses the same words, "instrument of mortgage or charge on the holding *executed*," and makes such instruments null and void if not registered within three months from the date of execution. In my opinion, "instrument" and "executed" are the governing words which run through and interpret sub-sections (3) and (4); and whatever may be the reason why a charge created by equitable deposit without writing is not within the meaning of the section, the fact remains that it is not. The case will go into chambers to take an account of what is due on foot of this equitable mortgage.

Solicitor for the plaintiffs: *W. H. Dunne.*
Solicitors for the defendants: *Crowley & Bolger.*

W. L.

Appeal.
1910.
June 9, 13.

IN RE LAMBERT, DECEASED; LAMBERT *v.* LAMBERT (1).

(1909. No. 1048.)

Power—Testamentary appointment to object on attaining twenty-one—Intermediate interest.

A., by will, gave the residue of his property to trustees in trust to invest same in Government funds, and to pay the interest and dividends thereof to his son B. for life, and thereafter to apply the principal to his (B.'s) children as he might appoint by deed or will, and in default of appointment equally. B., by will, appointed that a sum of £5000 should be paid to each of his younger sons and daughters on their attaining twenty-one, and the remainder to his eldest son. B. survived A., and died before any object of the power attained twenty-one. On B.'s eldest daughter attaining twenty-one—

Held, that she was entitled to the income of the £5000 so appointed from the death of B.

APPEAL by the plaintiff, Julia Mary Lambert, and Walter Peter Lambert, a minor, by the said Julia Mary Lambert, his next friend, from the order of Barton, J., dated the 21st March, 1910, except in so far as it declared that the defendant Amelia Lizzie Lambert, on attaining the age of twenty-one years, became entitled to be paid by the trustees of the will of Walter Peter Lambert, deceased, the sum of £5000, out of the principal of the personal estate comprised in the said Walter Peter Lambert's residuary trust estate; and application, that it be ordered and declared that each of the younger children of Peter Fitzwalter Lambert is entitled on attaining twenty-one years of age to be paid a net sum of £5000 and no more, and that the plaintiff Walter Peter Lambert is entitled to the residue of the residuary trust estate of the said Walter Peter Lambert deceased, and to the income from the death of the said Peter Fitzwalter Lambert, of all the said residuary trust estate, from time to time remaining unpaid to each of the said younger children.

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

Walter Peter Lambert, by his will dated 7th June, 1887, disposed of his residuary estate as follows :—

"All the rest and residue of my real and personal property I give to my trustees hereinafter named in trust, and I direct that same shall be invested in Government funds, and I direct that my said trustees shall hold the same and pay the interest and dividends thereof to my said son (1) during his life, and thereafter apply the principal to his children, or any one or more of them, in such manner as he may appoint by deed or will, or, if he fail to so appoint, to and among them equally." He appointed John J. Lopdell and Henry S. Persse trustees of his will, and his son Peter F. Lambert, executor.

By codicil of same date he directed that his trustees should be at liberty, either to leave the trust fund in its then state of investment or vary same with the consent of the son, but did not otherwise revoke or alter the residuary gift.

Walter Peter Lambert, the testator, died on October 19th, 1892, and his will was duly proved on the 11th of June, 1893, by Peter Fitzwalter Lambert, who entered into possession of the property under the said will, and so continued till his death, which took place on the 24th of February, 1894.

Peter Fitzwalter Lambert made his will, dated the 3rd February, 1893, the part of which exercising the power of appointment vested in him was as follows :—

"And of the assets or invested moneys left by my father in trust, I will and appoint that a sum of £5000 be paid to each of my younger sons and each of my daughters on their attaining the age of twenty-one years, the remainder being paid to my eldest son, but should only two children of mine attain the age of twenty-one years, then I appoint that a sum of £10,000 be paid to the younger of them, the remainder going to the eldest son, or if only one child of mine attain the age of twenty-one years, then all goes to that one child." He appointed R. A. Hewetson, and A. F. Head trustees of his will, and Peter Lambert, solicitor, his executor, to whom probate was duly granted on the 12th April, 1894.

(1) Peter Fitzwalter Lambert.

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Peter Fitzwalter Lambert left five children him surviving, viz., his eldest son, the plaintiff, and appellant, Walter Peter Lambert, Amelia Lizzie Lambert (a defendant and respondent), Mary Georgiana Lambert, and Henry Alexander Lambert, all of whom were infants under the age of twenty-one at the time of his death, and who were by order, dated the 19th March, 1895, made wards of Court. By the same order, a sum of £75 a year each was allowed for their maintenance.

Amelia Lizzie Lambert attained twenty-one years of age on 4th of June, 1909, and was discharged from wardship by order of 10th June, 1909. The other children were still minors.

By an order in the minor matter, dated the 28th July, 1909, made on the application of the plaintiff, Julia Mary Lambert, widow of Peter F. Lambert, and testamentary guardian of the minors, leave was given to institute proceedings in the Chancery Division for the determination of questions of construction arising under the wills of Walter Peter Lambert and Peter Fitzwalter Lambert, as to whether the said minors were entitled to the income and accretions thereof on the sums of £5000 each, part of the residuary estate of Walter Peter Lambert, appointed to them by the will of Peter Fitzwalter Lambert, Amelia Lizzie Lambert to act as guardian *ad litem* of the continuing minors other than Walter Peter Lambert.

In accordance with this order a summons was taken out by the plaintiffs against Amelia Lizzie Lambert, the continuing minors other than Walter Peter Lambert, and William Henry Robinson and Walter Peter Carson, defendants. The two last-mentioned defendants had been duly appointed trustees of the wills of Walter P. Lambert and Peter F. Lambert. The summons sought the opinion of the Court upon the following questions :—

1. Did the sum of £5000, appointed to each of his younger children by the will of Peter Fitzwalter Lambert, immediately vest in each younger child on the death of the said Peter Fitzwalter Lambert, or does such sum only vest in each child on attaining twenty-one years of age?

2. Is each of such younger children, on attaining twenty-one years of age, entitled to the surplus interest, dividends, and profits on said sums of £5000 each, after deducting thereout all sums paid for their respective maintenance and advancement?

3. Is each of such younger children, on attaining twenty-one years of age, only entitled to a net sum of £5000?

The summons was adjourned into Court, and was argued before Barton, J., by counsel for the several parties. His Lordship on March 16, 1910, made the order appealed from.

It was contended, in the Court below, on behalf of the plaintiffs, that the defendant, Amelia Lizzie Lambert, was entitled upon coming of age, to be paid a net sum of £5000 and no more, and that she was not entitled to any interest on the £5000, or to any share of the income of the residuary trust estate of her grandfather which had accrued since the death of the tenant for life. On the other hand, it was contended on behalf of the defendant, Amelia Lizzie Lambert, that she was entitled, upon coming of age, to be paid the interest which had accrued upon the £5000 since the death of the tenant for life. In the alternative, it was contended on her behalf, that she was entitled to one-fifth of the whole income of the residuary trust estate of her grandfather since the death of the tenant for life. The contention proceeded upon the hypothesis that Peter Fitzwalter Lambert had no power of appointment under his father's will, except as to the application of the principal of his father's residuary estate, and that as he had failed to appoint how the principal was to be applied during the minority of the five children, the defendant, Amelia Lizzie Lambert, would be entitled, in default of appointment, upon coming of age, to have paid to her the income of one-fifth of the residuary trust estate from the death of the tenant for life. Barton, J., decided in accordance with the latter contention, and made a declaration accordingly.

Jellett, K.C., and *Denning*, for the appellants :—

The only gift to the daughters and the younger sons is in

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the direction to pay on attaining twenty-one. Till then the legacies did not vest, and interest until then is not payable: *Leake* v. *Robinson* (1); see *per* Sir William Grant, M.R., at pp. 384, 385. Mr. Justice Barton has, however, held that Amelia Lizzie Lambert, on attaining twenty-one years, was entitled to one-fifth of the income of the whole of the residuary personal estate accruing from the death of her father, Peter Fitzwalter Lambert. This is admittedly in excess of the interest on the £5000, and encroaches on the interest on the residue left to the eldest son. Such a result, *prima facie* at variance with all legal principles, and unsupported by any authority, was arrived at by the learned Judge upon the construction he put on the will of Peter Fitzwalter Lambert. He held that the donee of the power failed to appoint how the principal of the trust fund was to be applied during the minority of the objects of the power, that it was to be therefore applied equally, and that, consequently, when the eldest daughter attained twenty-one, though she would be entitled under the express appointment to a capital sum of £5000 and no more, she would take a fifth of the income of the entire fund. It is submitted that this is a forced and unnatural construction, the effect being to give the eldest daughter interest on a capital sum she would never become entitled to. The gift to the eldest son is not dependent on his attaining twenty-one. *Leake* v. *Robinson* (1) was followed in *Locke* v. *Lamb* (2). There was no segregation of part of the funds here directed to meet the shares as in *In re Clements*; *Clements* v. *Pearsall* (3). *Long* v. *Ovenden* (4), which will, perhaps, be relied on for the eldest daughter, is explained by Chitty, J., in *In re Clements*; *Clements* v. *Pearsall* (3). When a legacy is contingent, the interest upon it, before the happening of the contingency, falls into the residue: *Guthrie* v. *Walrond* (5). This principle was quite recognized in *In re Woodin*; *Woodin* v. *Glass* (6); see judgment of Kay, L.J., p. 316. The effect of segregation upon interim interest and

(1) 2 Mer. 363.
(2) L. R. 4 Eq. 372.
(3) [1894] 1 Ch. 665.
(4) 16 Ch. D. 691.
(5) 22 Ch. D. 573.
(6) [1895] 2 Ch. 309.

accretions was considered by Chatterton, V.-C., in *Johnston* v. *O'Neill* (1), where he says (p. 480):—"It is, no doubt, the general rule that general legacies, payable at a future day, even though vested, do not carry interest before the day of payment, except legacies given to a child by a parent, or a person *in loco parentis*."

H. Morgan Byrne (with him *Samuels*, *K.C.*), for Amelia Lizzie Lambert:—

In the Court below we argued in the first place, pursuant to the summons, that the legatee was entitled to interest on her legacy of £5000 from the death of the tenant for life. In the alternative we presented the case that she was entitled to one-fifth of the whole income, giving credit in either case for the moneys applied for her maintenance. Walter P. Lambert's will draws a clear distinction between interest and dividends and principal. Barton, J., held that the only power given to Peter F. Lambert was to direct the trustees how to apply the principal.

But our real contention is, that she is entitled to the interest on the legacy of £5000, from the death of Peter F. Lambert. As to this, the authorities are clear and express. He had a testamentary power of appointment which he exercised by an appointment to an object of the power on her attaining a certain age In such a case the appointee is entitled to all intermediate accretions whether of income or otherwise. This was decided by Sir George Jessel, M.R., in *Long* v. *Ovenden* (2). This decision has never been questioned. It is cited in Theobald on Wills, 7th ed., p. 182, as an authority for the proposition that "an appointed fund carries the intermediate interest."

Again we rely on the fact that Walter F. Lambert stood *in loco parentis* to these legatees, and that, except the interest on their legacies, no fund was available for their maintenance pending their minority: *May* v. *Potter* (3). Theobald on Wills, 7th ed., 191. It is submitted that this principle extends to appointments under a power, though there does not appear to be any decided case on the point.

(1) 3 L. R. Ir. 470. (2) 16 Ch. D. 691. (3) 25 W. R. 507.

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THE LORD CHANCELLOR :—

The question in this case is, as to the period from which interest runs on a sum of £5000 appointed by the will of Peter Lambert under a power contained in the will of Walter Lambert, his father.

Walter Lambert had this son Peter, and five grandchildren—children of Peter, of whom Amelia Lizzie Lambert is the eldest. Walter Lambert had considerable real and personal property, and by his will, dated 7th June, 1887, he devised his estates in the county of Galway, described in the will, to the use of his son, Peter Lambert, for life, and after his decease to the children of Peter, in strict settlement, and he then made the following disposition of his residuary real and personal property : "All the rest and residue of my real and personal property I give to my trustees, hereinafter named, in trust ; and I direct that same shall be invested in Government funds, and I direct that my said trustees shall hold the same and pay the interest and dividends thereof to my said son during his life, and thereafter apply the principal to his children, or any one or more of them, in such manner as he may appoint by deed or will, or, if he fail to so appoint, to and among them equally."

Walter Lambert died on the 19th October, 1892.

Peter Lambert, his son, entered into possession, and died on the 24th February, 1894, leaving five children, all minors—three sons, and two daughters. The eldest son is Walter Peter Lambert, still a minor, and the daughter, Amelia Lizzie Lambert, is the eldest child.

Peter Lambert made his will on the 3rd February, 1893, and by his will exercised the power given to him by his father's will over the residuary real and personal property by appointing the landed property to his eldest son, with gifts over amongst his brothers and sisters, and then proceeds, "and of the assets or invested moneys left by my father in trust, I will and appoint that a sum of £5000 be paid to each of my younger sons and each of my daughters on their attaining the age of twenty-one years, the remainder being paid to my eldest son ; but should only two children of mine attain the age of twenty-one years, then I

appoint that a sum of £10,000 be paid to the younger of them, the remainder going to the eldest son, or if only one child of mine attain the age of twenty-one years, then all goes to that child."

He made no express provision for maintenance. The funds subject to this power were, and are, invested in Court securities.

The children were made wards of Court; and sums fixed by order of the Lord Chancellor were paid for their maintenance respectively.

Amelia Lizzie Lambert attained twenty-one on the 4th June, 1909; and a question arose whether she was entitled to be paid only the principal sum of £5000, or with it the interest accruing from the death of her father, Peter, after giving credit for the sums paid for her maintenance. It was not disputed that maintenance was lawfully given to her by the Court in respect of the £5000. An application was made to Mr. Justice Barton, under Order LI, for the purpose of determining the question, and the questions he was asked are—(1) Did the sum of £5000 appointed vest in each child upon the death of Peter Lambert, or only on attaining twenty-one? (2) Is each younger child, on attaining twenty-one, entitled to the surplus income accruing from the £5000, after deducting the sums paid for maintenance? (3) Is each younger child, on attaining twenty-one, only entitled to a net sum of £5000? Mr. Justice Barton declared that Amelia Lizzie Lambert, under the will and appointment, became entitled at twenty-one to be paid the sum of £5000; that Peter Lambert had failed to appoint in what manner the principal should be applied during minority, and that it was the duty of the trustees to apply it as in default of appointment for the benefit of the children; and that consequently she was entitled at twenty-one to be paid one-fifth of the income of the personal estate, comprised in the residuary bequest, which accrued between the death of her father and her attaining twenty-one, after deducting sums paid to her for maintenance.

The will and the appointment, which constitute one disposition, must be read together; and I am unable to agree in the construction which Mr. Justice Barton has placed upon it.

Walter and Peter Lambert had in view a provision for grandchildren and children. To effectuate that there was a direction to

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invest the funds in Government security as a permanent investment. If there had been no apportionment of the moneys under the power, each child would have got one-fifth, and the income of it from the death of Peter. The will of Peter made a different division as between the younger children and eldest son, by naming £5000 to be the share of each younger child. He says, "I appoint that a sum of £5000 be paid to each of my younger sons and each of my daughters on their attaining the age of twenty-one years, the remainder being paid to my eldest son." I think that is simply reading £5000 into the will of Walter, as the share, making the period of actual payment, as distinct from vesting, to be the attaining of twenty-one, when a receipt could be given for the money; the remainder means, I think, what is left after the four sums of £5000 are provided.

As regards the authorities which were referred to, I do not think that such cases as *Leake* v. *Robinson* (1), where the only gift is in the direction to pay, have any application to the rights under the exercise of a special power such as we have to deal with.

This is not a case in which Peter Lambert is giving a sum out of his bounty to a daughter at twenty-one. He is making an apportionment out of a fund directed to be invested for the purposes of a special power. It much more resembles the case of *Dundas* v. *Wolfe Murray* (2) and *Shaw* v. *Marten* (3).

The decision of Sir George Jessel in *Long* v. *Ovenden* (4) quite meets the present case: "Where a testator, having a power of appointment over personalty, appoints a share of the fund to an object of the power upon the happening of a certain event, the appointment carries with it all the intermediate accretions to that share, whether in the shape of income or otherwise."

There is also a general statement attributed to Sir George Jessel, at p. 694, which goes too far, but is quite correct if applied to the facts to which he meant it to be applicable.

If I am right in thinking that the daughter attaining twenty-one is entitled by virtue of the appointment to the income from the death of her father, the tenant for life, after giving credit for

(1) 2 Mer. 363. (2) 1 H. & M. 425. (3) [1901] 1 Ch. 370.
(4) 16 Ch. D. 691.

maintenance paid, it follows that the decision of Mr. Justice Barton, that she was entitled to one-fifth of the income of the whole special fund till twenty-one, as unappointed cannot be supported. I think that portion of his order must be discharged, and a declaration made in accordance with the view I have stated.

HOLMES, L.J.:—

I concur. When Peter Fitzwalter Lambert made his will in the year 1893, he had five children living—an eldest son, two younger sons, and two daughters; and when he died in the following year, he left the same family, all of whom are still living. His father, Walter Peter Lambert, had, by his will made in 1887, given all the residue of his real and personal property to trustees in trust to invest the same in Government funds, and to pay the interest and dividends thereof to his son, Peter Fitzwalter Lambert, during his life, and thereafter to apply the principal to his children, or any one or more of them, in such manner as he might appoint, by deed or will, or, if he fail to so appoint, to and among them equally. The son by the will already mentioned purported to exercise this power of appointment by directing that a sum of £5000 be paid to each of his younger sons and each of his daughters, on their attaining the age of twenty-one years, the remainder being paid to his eldest son. He then proceeds to say that if only two of his children should attain the age of twenty-one years, then he appointed a sum of £10,000 to be paid to the younger of them, the remainder going to the eldest son, or if only one child should attain the age of twenty-one years, then all was to go to that child. Mr. Justice Barton decided the case, without reference to authorities, on the particular language of the two wills; but I confess I find great difficulty in ascertaining from the language of the appointment in the second will, taken as a whole, what the testator meant; and I am glad to find that I am only called on at present to say what are the rights of Amelia Lizzie Lambert in the fund, she being the only one of five children who has attained the age of twenty-one years, and the four other children being still alive. Previous to the appointment becoming operative, there is no doubt that each of the five children had a vested

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interest in an equal fifth of the trust fund. The effect of the first clause of the appointment was to divide the fund amongst the five children in different proportions—£5000 to four of them, and the remainder to the eldest son, adding that, at least as to the four, payment was to be made on attaining the age of twenty-one years. I am of opinion that just as Miss Lambert had before the appointment a vested interest in one-fifth of the fund, the effect of the appointment was to give her a vested interest in £5000 thereof, liable to be divested if she did not attain the age of twenty-one. If this be so, she being now of age, is entitled to the principal sum of £5000, and to the income of that amount received by the trustees during her minority, less by the sums expended for her maintenance.

CHERRY, L.J. :—

I concur. In construing the will of Peter Lambert, the important matter to bear in mind is that, so far at all events as relates to the particular clause with which we are now dealing, he was merely exercising the power of appointment conferred upon him by the will of his father, Walter Lambert. This at once takes the case out of the authority of *Leake* v. *Robinson* (1), so strongly relied upon by Mr. Jellett. The argument is, that inasmuch as there is no gift, as distinct from a direction to pay, and no segregation of the fund until the time for payment arrives, the interest which accrues due before that date does not follow the gift, but goes as part of the remainder to the eldest son. The answer to that argument, which, I think, is conclusive, is that the prior will of Walter Lambert contains both the gift as distinct from the direction to pay and the necessary segregation of the fund, which by this will was vested in trustees for the benefit of the objects of the gift. The power conferred upon Peter Lambert by his father's will was, as from the date of his own death, "to apply the principal to his children, or any one or more of them, in such manner as he may appoint by deed or will, or, if he fail to so appoint, to and among them equally." The children became the owners of the fund upon their father's death. There was no "gift" to them by his will.

(1) 2 Mer. 363

In *Long* v. *Ovenden* (1), Jessel, M.R., decided that where a testator, having a power of appointment over personalty, appoints a share of the fund to an object of the power upon the happening of a certain event, the appointment carries with it all the intermediate accretions to that share, whether in the shape of income or otherwise. This decision has never been questioned, though some doubt has been cast upon certain *dicta* of the learned Judge in his judgment, by Chitty, J., in the subsequent case of *Clements* v. *Pearsall* (2). The decision itself, however, apart from the *dicta*, in my opinion, governs the present case. It may be said that the appointment here is of a specific sum forming portion of the fund and not of any particular share of it ; but I cannot see that, under the circumstances, that makes any difference. If three children are entitled to a sum of £15,000 in such shares as their father shall appoint, and he appoints £5000 to A, £5000 to B, and the remainder to C, why should a different rule be applied, as to interest, from that which would govern the appointment if it were of £5000 to each, or of one-third share to each. There is no difference in principle between this case and *Long* v. *Ovenden* (2). In both cases the testator was not making a gift to the persons benefited, but dividing between them property which was already theirs.

If we are right in holding that the appointment of the £5000 to the eldest daughter carries with it the interest on that sum from the date of her father's death, it follows of course that the gift to the eldest son of "the remainder" of the fund, after the payment of the shares of the younger children, also entitles him to the intermediate interest. The decision, therefore, of Barton, J., based upon the assumption that no appointment at all had been made of the interest, cannot stand, and the answers to the questions put must be amended accordingly.

Solicitors for the plaintiffs: *Lambert & Warren.*
Solicitor for the infant defendants: *R. G. Warren.*

W. G.

(1) 16 Ch. D. 691. (2) [1894] 1 Ch. 665.

Ross, J.
1910.
June 7, 13.

IN THE MATTER OF THE ESTATE OF HENRY THOMAS ARTHUR SHAPLAND BOYSE, OWNER AND PETITIONER, AND IN THE MATTER OF THE ESTATE OF CATHERINE BACKAS AND OTHERS, OWNERS OF LAND, CATHERINE BACKAS, PETITIONER.

Judgment mortgage—Registration—Failure to re-register every five years—Priority.

The failure to re-register judgments every five years in accordance with the provisions of the Judgment Mortgage Act, 1850, does not affect the priority of registered judgment creditors, *inter se*, but only as regards subsequent purchasers, mortgagees, and creditors.

Four judgments originally entered in the Court of Exchequer in the years 1755, 1757, and 1758, were registered in accordance with the provisions of the Judgment Mortgage Act, 1850. One of the judgments was re-registered every five years; but, as regards the other judgments, there were gaps of over five years in the re-registration.

Held, that the priority of the judgments, *inter se*, was not affected by the failure to re-register the judgments every five years.

APPLICATION by Catherine Backas that a sum of £216 should be paid to her out of the fund in Court on foot of a judgment for £2600 against the lands for sale in the matter, notwithstanding that the said judgment appeared only third in the original order of priority of the incumbrances on the lands.

By an order dated 18th April, 1910, the examiner was directed to ascertain and report as to the priority of the said judgment. The examiner reported as follows:—

1. Catherine Backas is entitled to a judgment for the sum of £2600, entered in the Court of Exchequer in the Easter Term, 1758; Humphrey Jones, plaintiff, George Jackson, defendant. The said judgment was duly re-docketed on 22nd November, 1831, and registered on 14th July, 1855, and has been re-registered pursuant to the statute on the following dates:—22nd March, 1860; 15th March, 1865; 15th March, 1870;

8th March, 1875; 2nd March, 1880; 28th February, 1885; 20th February, 1890; 18th February, 1895; 17th February, 1900; 17th February, 1905; and 5th June, 1908. The amount due on foot of said judgment is £1300. The arrears of interest due thereon to the said Catherine Backas up to the 25th March, 1910, is £216.

2. Henry T. A. S. Boyse is entitled to a judgment for the sum of £4000, entered in the Court of Exchequer in Easter Term, 1755; the Bishop of Waterford, plaintiff, George Jackson, defendant. The said judgment was duly re-docketed on 10th May, 1833, and registered on 23rd June, 1862, and re-registered on the following dates:—4th July, 1867; 19th June, 1882; 12th February, 1889; 17th December, 1894; and 14th January, 1910.

3. Mrs. M. A. Ryland is entitled to a judgment for the sum of £3000 entered in the Court of Exchequer in Easter Term, 1755; Barker and Green, plaintiffs, George Jackson, defendant. The said judgment was re-docketed on 14th December, 1831, and registered pursuant to the statute on 14th July, 1855, and has been re-registered on the following dates:—11th July, 1860; 6th November, 1871; 29th November, 1877; 28th October, 1882; 15th October, 1887; 11th October, 1892; 2nd October, 1897; 1st October, 1902, and 11th October, 1907.

4. Mrs. M. A. Ryland is also entitled to a judgment for the sum of £2000, entered in the Court of Exchequer in Easter Term, 1758; Humphrey Jones, plaintiff, George Jackson, defendant. The said judgment was re-docketed on 14th December, 1832, and registered pursuant to the statute on 14th July, 1855, and has been re-registered on the following dates:—11th July, 1860; 6th November, 1871; 29th October, 1877; 28th October, 1882; 15th October, 1887; 14th October, 1892; 2nd October, 1897; 1st October, 1902, and 11th October, 1907.

5. The original order of priority is as follows:—

(1) Judgment for £4000, vested in Henry T. A. S. Boyse.

(2) Judgment for £3000, vested in Mrs. M. A. Ryland.

(3) Judgment for £2600, vested in Mrs. Catherine Backas.

(3A) Judgment for £2000, vested in Mrs. M. A. Ryland.

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6. It appears from the schedule to the petition, filed by Henry T. A. S. Boyse, on 30th September, 1886, that judgments 2 and 3A affect only five-twelfths of the estate. Numbers 3 and 3A are in equal priority.

7. The judgment to which Catherine Backas is entitled has been kept re-registered within each statutory period of five years. None of the other judgments has been kept re-registered within each statutory period aforesaid.

8. I leave for the decision of the Court the question as to whether by such want of re-registration the original priority of said judgments has been affected. If it has been affected, the judgment to which Catherine Backas is now entitled is first charge on the whole of the lands herein. If it has not been affected, the priority of said charges is as set forth in paragraph 5 of this report.

W. M. Jellett, K.C., and *T. J. D. Atkinson*, for the applicant, Mrs. Catherine Backas :—

Under the Acts 3 Geo. 2, c. 7, and 9 Geo. 4, c. 35, judgments do not get any priority *inter se*, as the Acts only deal with mortgagees and purchasers : *Abbott* v. *Stratten* (1). In the Act 7 & 8 Vict. c. 90 the first mention of creditors occurs. The question in the present case will depend on the Judgment Mortgage Act of 1850, 13 & 14 Vict. c. 29. Sections 3 and 4 of that Act deal with judgment creditors who were already judgment creditors. Section 6 provides what a future creditor is to do to create a judgment mortgage. Therefore, the sections as to re-docketing refer to persons already creditors against the lands. In the case of *In re Huthwaite* (2) it was decided that an unre-docketed judgment lost its priority, not only against a subsequent mortgagee or purchaser, but also against intervening judgments duly re-docketed. In that case the intervening re-docketed judgment was brought up on the back of the subsequent mortgagee. The applicant here does not require such assistance, for she has the right in herself under the Judgment Mortgage Act. Notice is immaterial : *In re Loughnan's Estate* (3) ; *M'Carthy* v. *Fermoy* (4).

(1) 9 Ir. Eq. R. 233. (2) 2 Ir. Ch. R. 54. (3) 25. L. R. Ir. 515.
(4) 27 L. R. Ir. 275.

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G. Fitzgibbon, K.C., and *R. R. Smylie*, for Henry T. A. S. Boyse:—

The rule is settled that as between judgment creditors no priority exists *inter se* owing to re-docketing: *Woodroffe* v. *Greene* (1). The omission to re-register a judgment every five years defeats its priority in favour of subsequent purchasers, mortgagees, or creditors only: Appendix to Report of Law and Chancery Commission, p. 19; *Beavan* v. *The Earl of Oxford* (2). The Irish Act is made up of two English statutes, 1 & 2 Vict. c. 110, and 2 Vict. c. 11. It was not within the scope of this legislation to alter existing priorities, but to protect purchasers: *Shaw* v. *Neale* (3).

T. J. D. Atkinson, in reply:—

Section 6 of the Judgment Mortgage Act deals with something else than the subject-matter of sections 2 and 3. The English Acts do not provide for judgment creditors, except in sections corresponding to sections 2 and 3 of the Irish Act. There is no section in the English Acts corresponding to section 6 of the Irish Act.

June 13.

Ross, J.:—

The question discussed is conversant with four judgments entered up about the middle of the eighteenth century.

In one case the judgment has been regularly re-registered at the end of every five years' period since the passing of the Judgment Mortgage Act of 1850 (13 & 14 Vict. c. 29). In the other cases there are gaps in the re-registration amounting in some cases to ten years. The question is whether as between these judgment creditors the neglect to re-register within the five years period affects the priority.

I am told there is no direct authority on the point. We must, however, remember that sections 3 and 4 of the Judgment Mortgage Act are not to be taken as new legislation. The genesis of these sections is to be found in sections contained in two prior English Acts, namely, section 19 of 1 & 2 Vict. c. 110, and sections 2 and 4 of 2 Vict. c. 11. The words used in these prior statutes are substantially the same as those used

(1) 12 Ir. Ch. R. 224. (2) 6 De G. M. & G. 492. (3) 6 H. L. C. 581.

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in the Irish Statute. The object is the same, namely, to relieve purchasers, mortgagees, and creditors, by reducing the time within which they were to search for judgments.

The case of *Beavan* v. *Earl of Oxford* (1), in short, decides that only those who become purchasers, mortgagees, and creditors after the date of the registered judgment are affected, and that it was not within the scope of the legislation to improve the security of judgment creditors who were registered to the detriment of others who were not registered. This decision is completely set up by the case of *Shaw* v. *Neale* (2), decided by the House of Lords. This would seem to be conclusive on the meaning of what are in substance the same sections when introduced into the Irish Statute.

But the matter does not rest there. In the case of *In re Huthwaite* (3) it was held that a judgment not re-docketed is not merely void against a subsequent purchaser for value, but void against an intervening re-docketed judgment. This case does not decide that the re-docketing of the intervening judgment *per se* affected the priorities of the judgment, but that the only way in which the clear object of the Act could be attained was to allow the intervening re-docketed judgment to be brought up on the back of the conveyance for value. It thus acquired an artificial priority. But suppose the purchaser for value makes no claim to go up, then there is no reason for the artificial priority, and the judgments are unaffected: *Woodroffe* v. *Greene* (4).

In the light of the principles settled by these authorities it is useless for me to consider the arguments based on section 6 of the Judgment Mortgage Act. I am therefore of opinion that, as between these judgment creditors, the failure to register every five years regularly does not affect the priorities *inter se*, and that the only persons who can take advantage of such failure to register are subsequent purchasers, mortgagees, and creditors.

Solicitors for Mrs. Catherine Backas: *Keating & Keating.*
Solicitors for Mr. Henry T. A. S. Boyse: *Dobbyn & M'Coy.*

D. M. S.

(1) 6 De G. M. & G. 492. (2) 6 H. L. C. 581. (3) 2 Ir. Ch. R. 54.
(4) 12 Ir. Ch. R. 224.

M'GONIGLE *v.* M'GONIGLE.

Barton, J.
1910.
April 25.
Appeal.
June 7.

Will—Construction—"Effects"—"House and farm"—Inclusion of two holdings held under different contracts of tenancy—Extrinsic evidence—Oral statement of testator at time of execution of will—Inadmissibility of.

A testator by his will provided as follows:—"I dispose of my effects in the following manner: I bequeath to my brother P. my house and farm, subject to the obligation that he is to pay my wife the sum of £50."

Testator had two holdings close together, but not adjoining, situate in different townlands, and held under different contracts of tenancy, but under the same landlord. One of the holdings had a house on it in which the testator was living at the time of his death. According to the evidence both holdings were worked together.

Held, that both holdings passed to P. under the word "farm."

Held, also, that extrinsic evidence as to an oral statement made by the testator, at the time of the execution of the will, as to what he understood the word "farm" to mean, was not admissible.

Decision of Barton, J., affirmed by Court of Appeal.

By his will, dated 10th March, 1909, and executed two days before his death, a testator provided as follows:—"I, Patrick M'Gonigle, of Glasbolly, parish of Drumholme, do, in this my last will and testament, dispose of my effects in the following manner: I bequeath to my brother Peter my house and farm, subject to the obligation that he is to pay my wife the sum of £50." The will was drawn up by the parish priest, Canon Daly, from the instructions of the testator, who was then in his last illness. The deceased was possessed of a farm of land in the townland of Glasbolly, county Donegal, on which there was a house in which he resided; and he also had another holding in the townland of Foyagh, about a quarter of a mile away. There was no house on the Foyagh holding. Both holdings were held under the same landlord, but under different contracts of tenancy. The Glasbolly holding contained about five acres held at the yearly rent of £4. The Foyagh holding contained between fifteen or sixteen acres at the yearly rent of £12. Both holdings were worked together.

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An affidavit was made by Canon Daly setting out an oral statement made by the testator to him, at the time of the execution of the will, as to what he intended to pass under the devise of "my house and farm."

A grant of administration, with the will annexed, was on 4th April, 1910, made to the widow Isabella M'Gonigle.

On April 6th, 1910, Peter M'Gonigle issued an originating summons for the determination of the questions arising on the will.

T. J. D. Atkinson, for the plaintiff:—

On the construction of this will, the plaintiff is entitled to both farms, subject to the payment of £50 to the widow. The testator by the will disposes of the whole of his property, and he declares he does not wish to die intestate. He intends to dispose of everything he had in the world. "Effects" includes freehold as well as personal estate: *Smyth* v. *Smyth* (1); *In re Sheridan* (2).

"All my effects" means "all my property." "My house and farm" in its natural meaning includes the two farms adjacent to each other and worked together: *Burley* v. *Saint* (3). The result of a contrary view would be, that the plaintiff would get the one little farm saddled with the payment of £50, a sum exceeding its whole value, and thus making it *damnosa hæreditas*. Supposing there is any ambiguity, extrinsic evidence of the oral statement by the testator to Canon Daly, as to what he understood the word "farm" to mean, is admissible. A latent ambiguity has arisen, and proof of the testator's intention may be given: *Henderson* v. *Henderson* (4); *Phelan* v. *Slattery* (5). Parol evidence may be admitted to show the meaning of testator by proof of instructions for preparing the will: *In the Estate of Hubbuck* (6); *Samuel* v. *Ofner* (7).

(1) 8 Ch. D. 561.
(2) 17 L. R. Ir. 179.
(3) W. N. 1871, 221.
(4) [1905] 1 Ir. 353, 362.
(5) 19 L. R. Ir. 177.
(6) [1905] P. 129.
(7) [1909] 1 Ch. 60.

M'Loone, for the defendant, the administratrix :—

As to the admission of the affidavit of Canon Daly, to explain what the testator meant by the word "farm," the authorities are against the reception of such evidence: *Selwin* v. *Brown*, 3 B. P. C. 607; *Earl of Newburgh* v. *Countess Dowager of Newburgh* (1). The admission of such evidence would in effect repeal section 9 of the Wills Act (1 Vict. c. 26.)

"My house and farm" in their usual meaning can only apply to the small farm on which the dwelling-house was situated, and cannot possibly mean the testator's house and two farms. Part of a farm may be held in fee-simple, part for a term of years, and part from year to year; but if all these parts adjoin and are within the same fences, the entire is only one farm. On the other hand, if the two parcels of land are (as in this case) a quarter of a mile distant, and held under different rents and in different townlands and acquired at different times, they constitute two farms, and cannot pass under the word "farm." Here there is property to which the words used in the will clearly apply, and that is sufficient: 3 Taunt. 147. There is no ambiguity. In *Henderson* v. *Henderson* (2) extrinsic evidence was admitted, but the question there was as to the identity of a beneficiary, and the rule is different when the words refer not to the thing given, but to a person: *Higgins* v. *Dawson* (3): see Underhill and Strahan on Wills and Settlements (1906 ed.) 17, and the cases there referred to: see also *Baker* v. *Ker* (4).

BARTON, J. :—

I do not propose to admit the evidence of Canon Daly as to the oral explanation given by the testator of what he meant by the word "farm." Quite independently of that evidence I arrive at the conclusion that the word "farm" includes both holdings.

The testator begins his short will by the words, "I do in this my will and testament dispose of my effects in the following manner," and then he bequeaths his house and farm. It is evident that he includes in "effects" his lands, and that he meant to dispose of them all, and not to die intestate as to any of them.

(1) 5 Mad. 364.
(2) [1905] 1 Ir. 353, 362.
(3) [1902] A. C. 1.
(4) 11 L. R. Ir. 3.

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It seems doubtful whether he left any other assets. If so, they were trivial. At all events he was disposing of his lands as part of his effects, and intended to dispose of all his effects, including his lands.

He then says, "I bequeath to my brother Peter my house and farm, subject to the obligation that he is to pay to my wife the sum of £50." It appears that he was possessed of two small holdings. They were held under the same landlord, and were near to each other, but not actually contiguous. They were worked together. I think the word "farm" in this context carries the two little holdings. "Farm," in the old definition, which was cited at the Bar, includes "the lands therewith used." We must not allow ourselves to be misled by the technical definitions of the word "holding" in the Land Acts and elsewhere.

The testator was dealing with facts and things, and not with technical definitions. When he disposed of "his farm," he was, I think, referring to the land which he farmed and used as one farm for farming purposes, although held under two separate contracts. I have come across farms as to which, when title had to be made, it was found that part was held in fee, part under lease, and part from year to year. I dare say there are many farms, parts of which are held under different titles or contracts. Yet the whole, if worked as one farm, may be regarded and described as one farm.

Looking at the language of the will, I construe the words "my house and farm," as meaning the house which the testator lived in, and the lands which he used and worked as one farm.

R. W. L.

The defendant, Mrs. M'Gonigle, appealed to the Court of Appeal.

June 7.

The Court of Appeal (WALKER, C., HOLMES and CHERRY, L.JJ. affirmed the decision of Barton, J.

R. ST. J. C.

Solicitor for the plaintiff: *Ralph H. Reid.*
Solicitor for the defendants: *James Dunlevy.*

HERRICK *v.* HERRICK.

M. R.
1910.
April 19.

(1909. No. 243.)

Marriage Settlement—Covenant to settle after-acquired property—Bonus—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3.

The tenant-for-life of lands settled on his first marriage, and afterwards sold by him under the Land Purchase Acts, on his second marriage covenanted with the trustees of the settlement made thereon, that if at any time during the said marriage he should become beneficially entitled to or interested in any property, estate, or effects whatever, he would convey to them all such after-acquired property.

On the allocation of the purchase-money of the lands comprised in the first settlement, the percentage payable under section 48 of the Irish Land Act, 1903, was paid to the tenant-for-life, without any objection by the trustees of the second settlement. They subsequently took out a summons to have the question determined whether they were entitled to the percentage so received by the tenant-for-life.

Held, that the percentage was not after-acquired property within the meaning of the covenant in the settlement, and that the tenant-for-life was entitled to retain it.

In re Shelton's Estate ([1910] 1 Ir. R. 161) followed.

ORIGINATING SUMMONS.

By settlement dated the 25th October, 1870, and executed on the marriage of the Rev. George Herrick with Anne Babington, certain lands in the county of Cork were granted by Henry Herrick (father of the said George Herrick) and George Herrick to George Beamish and Richard Babington, to the use of George Herrick for life, with remainder to the use of such son of the marriage and his heirs male as the said George Herrick should appoint, and in default of such appointment to the use of the first and every other son of the said marriage severally and successively in tail, with divers remainders over.

M. R. 1910.

HERRICK v. HERRICK.

Anne Herrick, otherwise Babington, died in January, 1872, leaving one son, Henry Herrick, who was still alive.

By settlement dated the 10th October, 1878, and made between the said George Herrick of the first part, Isabella Adelaide Wall of the second part, John Henry Beamish Herrick and Robert Morton Wall of the third part, being the settlement executed on the marriage of the said George Herrick and Isabella Adelaide Wall, the share of the said Isabella Adelaide Wall in certain lands was put in settlement, and the said George Herrick covenanted to insure his life for £1000.

The settlement contained a recital, that it was agreed on treaty for the said marriage that the said George Herrick should assign the interest of any money or moneys to which at any time after the solemnization of the said marriage he might become entitled, or of which he should become possessed, by virtue of any will, deed, or otherwise howsoever, and the following covenant: "And the said George Herrick doth hereby for himself, his heirs, executors, and administrators, further covenant with the said trustees and the survivor of them, their, or his executors, administrators, and assigns, that if at any time during the said marriage he shall by transmission, bequest, gift, devise, direction, representation, or otherwise become beneficially entitled to, or interested in, any property, estate, or effects whatsoever, then, and in such case, he the said George Herrick, his heirs, executors, administrators, or assigns, shall and will at the cost of the said trust estate from time to time, by effectual assurance and assignment or other act in the law, to the satisfaction of the said trustees or the survivor of them, or the executors or administrators of such survivor, their or his assigns, settle and assure to, or otherwise cause to be vested in, the said trustees or the survivor of them, their, or his executors, administrators, or assigns all such thereafter acquired property, estate, and effects of the said George Herrick, and all his estate, right, and interest therein," to be invested by the said trustees and held by them "in trust to pay the income during their joint lives to the said George Herrick and Isabella Adelaide Wall, so that neither shall have power to deprive themselves thereof in anticipation, and after the death of either of them to pay the same to the survivor during his or her life, and in the event of the said George Herrick dying before the said

Isabella Adelaide Wall, to pay her the interest on said policy of assurance when received together with the annual income of the said other acquired property as aforesaid, subject to the like restraint upon anticipation as aforesaid, and after the death of the survivor of the said George Herrick and Isabella Adelaide Wall to hold the said policy and the said other acquired property in trust for the child or children of the said marriage, as the said George Herrick and Isabella Adelaide Wall shall by deed jointly appoint, and in default of such appointment as the survivor of them shall by deed or will appoint, and in default of such appointment in trust for all the children, or any the child of said intended marriage who being a son or sons shall attain the age of twenty-one years, or being a daughter attain the age of twenty-one years or marry, and, if more than one, in equal shares."

There were five children of the second marriage, all of whom were alive, three of whom were of full age, and two minors. On December 7th, 1897, the Rev. William O'Hanlon was appointed trustee of the settlement of 1878, in the place of Robert Morton Wall, deceased.

In the month of June, 1906, George Herrick agreed to sell to the tenants the lands comprised in the settlement of 1870, under the Land Purchase Acts. On December 16th, 1907, the purchase-money of part of the said lands known as the Belmont estate was allocated; and by order of Wylie, J., made on the ruling of the final schedule of incumbrances, the sum of £776 0*s.* 9*d.* representing the bonus or percentage on the purchase-money under section 48 of the Irish Land Act, 1903, was directed to be paid to the said George Herrick, the tenant-for-life of the said lands. The trustees of the settlement of 1878 did not bring in any formal objection, and did not object to the said order being made; and on January 10th, 1908, the said sum was paid to the said George Herrick.

The trustees subsequently, acting under the advice of counsel, took out this originating summons, to have it determined whether they were entitled to the sum of £776 0*s.* 9*d.* so paid to the said George Herrick. The said George Herrick, his wife and children, were made defendants to the summons, and a guardian *ad litem* was appointed for the minor children. The plaintiff, J. H. B.

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Herrick, died before the hearing of the summons; and the proceedings were continued by the surviving trustee, the Rev. William O'Hanlon, commonly called "The O'Hanlon."

William Lawson, for the plaintiff.

Norwood, for the Rev. George Herrick.

The vendor was entitled to retain the bonus, as it was not after-acquired property. *Shelton's Estate* (1), decided by Wylie, J., on March 13th, 1910, not yet reported, is directly in point. The words there were:—"If the vendor now is, or if during coverture she shall become seised or possessed of or entitled to any real or personal property, she shall convey the said property to the trustees." Wylie, J., held that the bonus was not captured by the covenant, following *In re Annaly's Estate* (2) and his own decision in *Power's Estate* (3), and declining to follow *Tremayne* v. *Rashleigh* (4). Here the words are words of futurity only.

Robert Doyle, K.C., for the children who were of age, supported the vendor's contention.

Hungerford, for Mrs. Herrick, and the minor children.

The plaintiffs are not the trustees of the settlement creating the life estate, but the trustees of the settlement of the second marriage. The life estate of the Rev. George Herrick is not mentioned in the second settlement. The bonus was only obtained on the sale, and was after-acquired property; is not an incident inherent in the land, but is created by statute. The covenant does not contain the words "not hereinbefore settled," which were apparently the basis of the judgment in *Power's Estate* (3), nor the words "interest in any property besides the real estate settled," relied on by Kekewich, J., in *Annaly's Estate* (2); *Tremayne* v. *Rashleigh* (4) is in favour of our contention, though *Shelton's Estate* (1) is opposed to it.

(1) Since reported [1910] 1 Ir. R. 161.
(2) 53 W. R. 150.
(3) [1907] 1 Ir. R. 51.
(4) [1908] 1 Ch. 686.

THE MASTER OF THE ROLLS :—

I decline to throw any doubt on the decisions of Wylie, J., in the case of *Power's Estate* (1) and in the case of *Shelton's Estate* (2). Numbers of allocations must have proceeded and many percentages must have been dealt with on the basis of the decision in *Power's Estate* (1). In point of fact this particular case was, I apprehend, dealt with by Wylie, J., as coming within the principle of his decision in *Power's Estate* (1), and the bonus was paid out to the tenant-for-life without question. It is true that the trustees of the settlement did not argue the question before Wylie J., or claim that the bonus was captured by the covenant relating to after-acquired property. It was therefore proper, there being minors interested, that the matter should be brought forward for formal decision, and that the trustees should not be liable at some future date to have a claim made against them, on behalf of the children, who are now infants, in respect of this fund. But, having regard to the terms of the settlement and to the words of the covenant, which plainly point to after-acquired property in the strictest sense of the words "shall become"—these are the governing words—I consider that the present case is *a fortiori* a case for the application of the principle laid down in the decisions of Wylie, J.; and I apply those decisions to the present case, and follow them without comment. As the summons was taken out *bona fide* for the purpose of protecting the trust estate, I shall give the plaintiffs their costs out of the trust estate.

Solicitors for the plaintiffs: *A. & J. Robinson.*

Solicitors for the defendants: *Gregg, Jermyn, & Sons*; *Bernard & Son.*

W. L.

(1) [1907] 1 Ir. R. 51. (2) Since reported [1910] 1 Ir. R. 161.

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April 22, 23, 28, 29.
May 18.

F. CADE & SONS, LIMITED, AND OTHERS *v.* JOHN DALY & CO., LIMITED.

Trade combination—Agreement between traders to keep up prices—May be enforced by injunction—Agreement in restraint of trade—When combination to keep up prices is—Penalty—Liquidated damages—Deed—Construction—Escrow—Practice—Pleadings—Amendment.

An agreement between a number of traders not to sell certain specified goods below certain specified prices is not necessarily unenforceable, as being in restraint of trade.

Such an agreement, if bounded by reasonable limits of space and time, and made with a view to protecting local trade, as far as it may be legitimately protected, will, if necessary, be enforced by injunction against parties to the agreement who violate its provisions.

Each case in which the question of restraint of trade or partial restraint of trade arises must be considered in the light of its own facts and circumstances.

Urmston v. *Whitelegg* (63 L. T. (N. S.) 455; 55 J. P. 453) and *The Mogul Steamship Company* v. *M'Gregor, Gow, & Co.* ([1892] App. Cas. 25) distinguished.

TRIAL OF ACTION.

A number of traders in the city of Cork and its neighbourhood formed an association called "The South of Ireland Mineral Water Manufacturers and Bottlers Trade Protection Association." The plaintiffs and the defendant Company were members of this association. The objects of the association as set out in the "Rules and By-laws" of the association were—

"To protect the bottles, jars, or boxes of members, which bear their names or trade marks, from being used or dealt with by any persons not having lawful authority for using or dealing with the same. To organize and carry into effect a system of collection, sorting, and storage, and for the restoration to the members of lost, misplaced, stolen, or misappropriated bottles, jars, and boxes, belonging to members; and further to prevent, as far as possible, the collection by the employees of members of any bottles or boxes, which do not belong to their respective employers.

"To establish a Bottle Exchange or Clearing House to facilitate the carrying out of the above objects.

"To punish by fines, or otherwise, and to prosecute by law, all persons found using, dealing in, selling, retaining, or destroying any bottles or boxes which are the property of members of the association.

"To provide for and be a central medium of useful information available for every member of the association, and generally for the furtherance and promotion of their interests.

"To suggest, adopt, support, and carry into effect any measure for the protection and interests of the trade.

"To co-operate or communicate with any kindred association or society in any part of the United Kingdom.

"To do anything conducive or incidental to all or any of the above objects."

Rule 2 of the said Rules provided that the association should be governed by a council of six, to be elected annually.

Rule 6 provided that members should sign a declaration agreeing to conform to the rules and by-laws of the association, and to accept such penalties as the council might impose upon them for any breach of such rules and by-laws.

Rule 19 was as follows: —"Any member intending to withdraw from the association will be required to give one month's notice in writing of such intention before the expiration of each current year, otherwise he shall be deemed to have continued his membership for the following year, and subject to these rules."

On the 31st December, 1907, a deed was executed by certain members of the said association, amongst whom were the plaintiffs and the defendant Company, in the following terms:—"THIS INDENTURE, made the thirty-first day of December, one thousand nine hundred and seven, between the several incorporated companies and persons whose names and addresses are set forth in the first schedule hereto, each of whom is to be deemed a contracting party with the remaining companies and persons named in said first schedule collectively, and with each one of them separately. Whereas the incorporated companies and persons have formed themselves into an association known as the South of Ireland Mineral Water Manufacturers and Bottlers Trade Protection

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Association (hereinafter called the Association), and whereas the said Association have resolved to fix certain prices for the sale of minerals, beer, stout, porter, hop bitters, and ginger stout, sold by the members of the said Association, within a radius of sixteen miles from the General Post Office in the city of Cork, excluding the towns of Midleton and Queenstown, which said prices are set forth in the second schedule hereto. NOW, THESE PRESENTS WITNESS, and it is hereby agreed by and between said parties hereto as follows:—(1) The stipulations and agreements hereinafter set forth shall be read and construed for all purposes as if each of the said incorporated companies and persons had entered into a covenant under seal in the terms of the said stipulations and agreements with all the other companies and persons named in the said first schedule hereto, and into a separate covenant under seal in like terms with each of the said companies and persons named in the said first schedule hereto. (2) None of the said companies or persons shall or will sell mineral waters, beer, stout, porter, hop bitters, or ginger stout, at lesser prices than those set forth in the second schedule hereto to any customer or customers residing or carrying on business within a radius of sixteen miles from the said General Post Office in said city of Cork, excluding the towns of Midleton and Queenstown. (3) Each of the said companies and persons shall and will at any time, when called upon so to do by a resolution passed by the Association, furnish a statement in writing to Henry J. M'Coy, of Coach Street, in the city of Cork, the secretary of the Association, or such other secretary as may be appointed by the said Association, showing the actual prices at which any of the said articles mentioned in the said second schedule hereto have been sold by such company or person within such radius, and will permit the said Henry J. M'Coy, or such other secretary as aforesaid, to inspect the books of such company or person, for the purpose of verifying such statement. (4) In case any of the said companies or persons named in the said first schedule hereto shall commit any breach of the said stipulations and terms hereinbefore set forth, all the other companies and persons named in the said first schedule hereto shall be deemed to have thereby sustained

actual and ascertained loss and damage collectively to the extent of five pounds sterling, and it is hereby agreed that any of the companies or persons who shall commit any such breach shall and will upon demand pay to the said Henry J. M'Coy, or such other secretary as aforesaid, the sum of five pounds sterling, to be distributed by him in equal shares amongst the companies and persons named in the said first schedule hereto, other than the company or person who shall have committed such breach. It is hereby expressly agreed that the said Henry J. M'Coy, or such other secretary as aforesaid, shall from time to time be at liberty to sue in the names of the remaining companies and persons named in the said first schedule hereto for the said sum of five pounds sterling, when and so often as the same shall become payable by any of the said companies or persons named in the said first schedule hereto. For the purpose of effectuating the foregoing provisions each of the said companies and persons named in the said first schedule hereto doth hereby nominate, constitute, and appoint the said Henry J. M'Coy, or such other secretary as aforesaid, the true and lawful attorney of such company or person as the case may be in their or his name to institute and carry on proceedings for the recovery of the said sum of five pounds sterling from any of the other companies or persons named in the said first schedule hereto. (5) Any of the said companies or persons named in the said first schedule hereto may determine their or his liability under these presents by giving to the said Henry J. M'Coy, or such other secretary as aforesaid, six months' previous notice in writing of their or his intention to determine same, but upon such determination these presents shall remain binding upon all the said companies and persons then named in said schedule who shall not have given such notice in the same manner as if such companies and persons who shall not have given such notice, and no others, were parties to these presents. The insertion from time to time in the said first schedule of the names and addresses of other companies and persons than those who may have originally executed these presents, and the execution from time to time of these presents by other companies and persons than those who may have originally executed same, shall not be deemed to vitiate these presents, or to release from liability thereunder

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any company or person who may have originally executed same, it being the true intent and meaning hereof that these presents shall be binding in the manner set forth in paragraph one hereof upon all companies and persons who may from time to time execute these presents, save any such company or person who may have terminated their or his liability hereunder in the manner hereinbefore provided. IN WITNESS whereof the respective common seals of the said companies have been hereto affixed, and each of the said persons named in the said schedule hereto set his hand and affixed his seal the day and year first herein written :—

Present when the common seal of John Daly and Company, Limited, was hereto affixed :—

J. C. FOLEY,
Secretary.

[Seal.]
W. GREEN,
H. J. MAHONY,
} Directors.

Present when the common seal of F. Cade and Sons, Limited, was hereto affixed :—

J. CATCHPOLE,
Cashier.

[Seal.]
W. F. CADE.
R. H. TILSON.

Present when the common seal of Kiloh and Company, Limited, was hereto affixed :—

GEO. HARVISON,
Secretary.

[Seal.]
JAMES KILOH.

W. Green, trading as Kennedy and Co. [Seal.]
Thomas Jennings. [Seal.]
Denis J. Murphy. [Seal.]
W. Kelleher, trading as Wm. Kelleher and Son. [Seal.]
D. F. Sullivan, trading as Haden and Co. [Seal.]
John J. Sutton, trading as Abbott Brothers, *per* N. Sutton, Manager. [Seal.]
John Henchy and Sons. [Seal.]

SECOND SCHEDULE REFERRED TO IN FOREGOING DEED.

Bass, ...	per dozen,		2/2.
Allsopps, . . .	„	„	2/2.
Do. (Hand Up), .	„	„	1/7.
Guinness' Extra, .	„	„	1/9.
Do. Porter, .	„	„	1/5.
Murphy X, . .	„	„	1/4.
Hop Bitters, . .	„	„	1/2.
Ginger Stout, . .	„	„	1/2.
Minerals, . . .	„	„	1/-
Beamish and Crawford,	„	„	1/4.

Subject to a maximum discount of 5 per cent.

The defendant company gave one month's notice before the end of the year 1909, pursuant to the rules of the Association, to determine their membership of the Association. The company admitted making sixteen sales at prices lower for the respective liquors sold than those provided for the same by the second schedule to the agreement above set forth. All these sales took place in the year 1910. The defendant company further admitted the issue and publication by them of a circular and price list dated the 1st January, 1910, whereby the defendant company undertook to offer and to sell to the public the liquors specified in the second schedule to the said agreement at prices lower than those stipulated and provided for by the said agreement, in breach thereof. These admissions were made in reply to a notice to admit served by the plaintiffs. It was not disputed at the trial that if the agreement was still binding on the defendant company they had committed breaches of its provisions.

The plaintiffs' statement of claim was as follows:—

"1. The several plaintiffs in this action, and also the defendant company, carry on the business of mineral water manufacturers and bottlers in the City of Cork and the South of Ireland.

"2. By an agreement under seal, dated the 31st day of December, 1907, to which the plaintiffs and the defendant company were parties, and wherein it was recited that the said parties

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had formed themselves into an association known as the 'South of Ireland Mineral Water Manufacturers and Bottlers Trade Protection Association,' and that the said Association had resolved to fix certain prices for the sale of the minerals, beer, stout, porter, &c., sold by the members of the said Association within a radius of sixteen miles from the General Post Office in the city of Cork (excluding the towns of Midleton and Queenstown), the said parties mutually agreed that they would not sell within the said district so limited the said liquors to any customers at lesser prices than those set out in the second schedule thereto, and that for any breach of the said agreement by any of the parties, all the other parties should be deemed to have sustained actual damages collectively to the extent of £5.

"3. The defendants have, in violation of the said agreement, sold to customers within the said limited district, beer, porter, and liquors at lesser prices than those specified in the schedule to the said agreement; particulars of the said sales are within the defendants' knowledge, and are set out in the affidavit of James Uniacke filed in this action on the 3rd day of March, 1910.

"4. The defendants have issued price lists, offering for sale the liquors mentioned in the agreement aforesaid at prices lower than those in the said agreement mentioned, and refuse to comply with or to be bound by the stipulations contained in the said agreement, or any of them."

The plaintiffs claimed:—

1. An injunction to restrain the defendants, their servants and agents from committing or continuing to commit breaches of the said agreement, and in particular from selling or offering for sale within a radius of sixteen miles from the General Post Office in the city of Cork (excepting the towns of Midleton and Queenstown) beer, stout, porter, and other liquors in the said agreement mentioned, at lesser prices than those therein agreed to.

2. An account of the sales made and effected by the defendants in breach of the stipulations in the said agreement.

3. An order for the payment of the sum of £5 by way of penalty for each such sale as may be ascertained to have been so

made and effected by the defendants in breach of the said agreement.

4. Damages.

5. Further and other relief.

6. Costs.

The defendants' defence was as follows:—

"1. The defendant Company admits the statements in the first paragraph of the statement of claim contained.

"2. The defendant Company does not admit that the agreement made between the plaintiffs and defendants is in the terms set forth in the second paragraph of the statement of claim, and refers to the original of said agreement when produced.

"3. As to paragraph 3 of the statement of claim, the defendant Company deny that they have violated the said agreement in the manner alleged, or at all, or that they sold to customers within the said limited district mentioned in the said agreement, beer, porter, or liquor at lesser prices than those specified in the schedule to the said agreement.

"4. The defendants further say that the plaintiffs, F. Cade and Son, Limited, are not entitled to sue upon the alleged agreement, because they repudiated and abandoned same, and refused to be bound by the terms thereof, and not merely sold goods at prices below those mentioned in the said agreement, but also gave, by way of bonus to customers, large quantities of goods without charging therefor, and thereby reduced the actual prices still lower.

5. "By way of further defence to this action the defendant company will submit that the said agreement is invalid and not binding upon any of the parties thereto, as being against public policy, and in restraint of trade, and made without consideration."

The plaintiffs joined issue. The defendants subsequently made the admissions above referred to. At the trial, the defendants having previously served notice of their intention to make the application, applied for leave to amend their defence by adding thereto a further paragraph as follows:—

"The defendants further say, that they executed the said deed only on the condition that it was to be executed by all

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the other members of the South of Ireland Mineral Water Manufacturers and Bottlers Trade Protection Association, and that the said deed was delivered by the defendants only as an escrow to take effect on the execution thereof by all the members of the association aforesaid, but the said deed was not executed by all the said members."

His Lordship stated that he would permit the amendment owing to the wholly exceptional circumstances of the present case. Among other things, the defendants had upon the dropping of a motion for an interlocutory injunction agreed to put in their defence within two days after the service of the statement of claim. But his Lordship intimated that he did not desire to infringe upon the general rule, that when an action comes to trial, all questions of fact which go to the root of the claim or defence should appear upon the pleadings.

Ronan, K.C. (with him *Matheson, K.C.*, and *The Hon. Cecil Atkinson*), for the plaintiffs:—

The defendants are an executing party to the deed. The restriction in the present case is not unreasonable. The area is only sixteen miles from the General Post Office, Cork, and Midleton and Queenstown are excluded from it. The test to be applied is whether the restrictions are reasonably necessary, with reference to the object of the contracting parties. Leake on Contracts (3rd ed.), p. 640; *Collins* v. *Locke* (1); *Maxim, Nordenfelt, &c., Co.* v. *Nordenfelt* (2); *Jones* v. *North* (3). The prevention of cutting of prices is a legal object. It is not a detriment to the public that a few traders in Cork and its neighbourhood should combine for this purpose. As to *Urmston* v. *Whitelegg* (4), the facts of that case must be considered. There the arrangement was to continue for ten years, without limit of space. That was an action for a penalty. Adequacy of consideration need not be taken into account: Pollock on Contracts, (6th ed.), p. 342; *Hitchcock* v. *Coker* (5); *Gravely* v. *Barnard* (6).

(1) 4 App. Cas. 674.
(2) [1893] 1 Ch. 630, per Bowen, L. J., at p. 657.
(3) L. R. 19 Eq. 426.
(4) 63 L. T., (N. S.) 455. (On appeal), 55 J. P. 453.
(5) 6 A. & E. 438.
(6) L. R. 18 Eq. 518.

The Solicitor-General (*C. A. O'Connor, K.C.*) (with him *James O'Connor, K.C.*, and *M. F. Linehan*) for the defendants :—

The deed was executed as an escrow. Regard must be had to the intention of the parties when they executed the deed. The names of the parties appeared only in the schedule. The deed was intended to be between all the members of the association, and not between a few members of it. The membership of the association must be constantly changing through death and other causes. The deed was not intended to be binding on the signatories to it, apart from the members of the association as a whole: Norton on Deeds, p. 15. We do not dispute that the deed was delivered, though that is not stated in the deed, but it was delivered *sub modo*. It was understood that the other members should execute it. Were Daly & Co., Ltd., to be bound, if only one other party executed it? It would be an agreement to cut one another's throats. In no case has an injunction been granted restraining a person from selling below certain prices. *Urmston* v. *Whitelegg* (1). This is a case of pure restraint of trade, with no resulting advantage: *Collins* v. *Locke* (2); *Hilton* v. *Eckersley* (3); *Homer* v. *Ashford* (4). In the *Mogul Steamship Co.* v. *M'Gregor, Gow, & Co.* (5), *Hilton* v. *Eckersley* (3) was distinguished. The difference between illegal and unlawful agreements was pointed out. An agreement in restraint of trade may not give rise to a right of action, and yet may be unenforceable: *Mineral Water, &c., Society* v. *Booth* (6). *Urmston* v. *Whitelegg* (1) is an express authority in our favour. The Court may look at the consideration to see if the contract is reasonable: *Nordenfelt* v. *Maxim, Nordenfelt, & Co.* (7).

The question is, whether the restraint is reasonable. Does it give a fair protection to the interests of the parties, without being so large as to prejudice the interests of the public? In this case there is no question of protection of interests. If this is an

(1) 63 L. T. (N. S.) 455. (On appeal), 55 J. P. 453.
(2) 4 App. Cas. 674.
(3) 6 E. & B. 47.
(4) 3 Bing. 322, per Best, C.J., at p. 326.
(5) [1892] App. Cas. 25.
(6) 36 Ch. D. 465, per Collins, L.J., at p. 471.
(7) [1894] App. Cas. 535.

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effective agreement, it binds all the bottlers, and is against public interest. If it has not got that effect, it throws a burden on the parties without any corresponding benefit.

The penalties are not enforceable merely because the words "liquidated damages" are used: *Ranger* v. *Great Western Railway Co.* (1). The question is always one of fact, whether what is really intended is a penalty: *Clydebank Engineering and Shipbuilding Company* v. *Yzquierdo* (2); *Elphinstone* v. *Monkland Iron Co.* (3). The plaintiffs themselves broke the agreement.

May 18.

THE MASTER OF THE ROLLS:—

This action is brought by a number of gentlemen who are members of a certain society or association. The rules and by-laws of the society or association now before me are entitled "Rules and By-laws of the South of Ireland Mineral Water Manufacturers and Bottlers Trade Protection Association" (*for use of members only*). I fear that so far as that phrase is concerned, it is rather out of date, because these rules and by-laws have been the subject of very extended arguments in my Court. In opening my judgment I desire to repeat an observation I made during the discussion in reference to these rules and by-laws, and that is this, that the objects aimed at by the deed upon which this action is based, and on the faith of which some members of the Association entered into the arrangement embodied in that deed, bear no relation whatever to the objects of the Association as set out in the rules and by-laws; and if ever there was a case in which eminent commercial men had reason to regret their departure from the good old maxim *ne sutor ultra crepidam*, it is this case. Why these gentlemen who started a society or association of bottlers for the purpose of protecting the bottles, jars, and boxes of the members, and of carrying out a system of sorting, collecting, and storage of bottles, took upon themselves to fix the prices of intoxicating and non-intoxicating liquors, I cannot imagine. The deed of the 31st December, 1907, opens in the following manner:—"This indenture, made the 31st December, 1907, between the several incorporated companies and persons

(1) 5 H. L. C. 72. (2) [1905] App. Cas. 5. (3) 11 App. Cas. 332.

whose names and addresses are set forth in the first schedule hereto, each of whom is to be deemed a contracting party with the remaining companies and persons named in said first schedule collectively, and with each one of them separately. Whereas the incorporated companies and persons have formed themselves into an Association known as the South of Ireland Mineral Water Manufacturers and Bottlers Trade Protection Association, hereinafter called the Association. And whereas the said Association have resolved to fix certain prices for the sale of minerals, beer, stout, porter, hop bitters, and ginger stout, sold by the members of the said Association, within a radius of sixteen miles from the General Post Office in the City of Cork (excluding the towns of Midleton and Queenstown), which said prices are set forth in the second schedule hereto." I have searched in vain for the connexion between the rules of the Association and this deed; but the very fact that there is no such connexion apparent is, in my opinion, a matter of importance to the parties, and for this reason. One of the rules of the Association referred to by the Solicitor-General, and dwelt on by Mr. James O'Connor, is rule 19, and it provides that "any member intending to withdraw from the Association will be required to give one month's notice in writing of such intention before the expiration of each current year, otherwise he shall be deemed to have continued his membership for the following year, subject to these rules." Now, the defendants undoubtedly gave one month's notice before the end of the current year 1909, to determine their position as regards the Association; and if the deed was purely and simply an association deed, and was *intra vires*, I should hold that Messrs. Daly and Company were free from the obligation of the deed. In other words, having ceased to be members of the Association, having withdrawn for what I would consider reasonable cause, and having given what, in my opinion, amounted to sufficient notice within the meaning of the Association rule, this action could not be maintained against them. But I think it is impossible to hold otherwise than that the deed must be read as something distinct and apart from the rules and by-laws of the Association. The whole scope and frame of the deed shows this. Take the period of membership under the deed.

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It extends beyond, or may extend beyond, the period of membership of the Association; and rightly enough, because if there was to be any efficacy at all in the agreement to sell at certain prices (an agreement which was to bind all the signatories to the deed), it was manifestly reasonable that a longer period than one month should be required for service of notice of withdrawal. In effect the deed says:—"We, the members of the Association, desire to fix the prices as regards any of the members of the Association who are willing to sign this deed and remain bound by its provisions. As regards them, they must not sell below certain prices. Though they still continue their membership of the Association, they may retire from the obligation of the deed. They may retire from the Association and from the obligation of the deed respectively in the one case by giving one month's notice, and in the other case by giving six months' notice." There is nothing unreasonable in saying that if they retire from the Association they are not to have five months' start over their colleagues who have joined in the deed.

There might be many reasons why persons who retired from the deed would desire to keep on their membership of the Association. They cannot get out of their obligations under the deed except under its provisions. It could not be held that firms remained bound by the deed, though they had given due notice of withdrawal under it, simply because they continued members of the parent society, which, as I have shown, was really a society or association altogether unconnected with the objects of the deed. On the other hand, Messrs. Daly & Company, Limited, cannot escape their obligations, if obligations there are imposed by the deed, on the ground that although the six months' notice required by the deed had not been served, they had terminated their membership of the Association prior to the beginning of the present year.

I need not linger over the arguments relative to the defence that the deed was delivered merely as an escrow. The evidence upon the point is conclusive in favour of the plaintiffs.

The main argument centred round the plea that the deed was void as being in restraint of trade, or at least that it was a deed which a Court of Equity would not enforce. There is a mass of

anthority, not altogether homogeneous, on this question of what is a contract in restraint of trade and what is not; and also upon the question as to when, and under what circumstances, a Court of Equity will lend its aid to enforce a contract which appears to be in partial restraint of trade. The fact is that every case in which the question of restraint of trade, or partial restraint of trade, has arisen, or may arise, must be considered in the light of its own facts and circumstances, and if the case which appeared at one time so destructive to the case of the plaintiffs here, the case of *Urmston* v. *Whitelegg Brothers* (1), is viewed in that light, it is no authority against the plaintiffs in the present case. In point of fact, when the facts of that case are closely examined, the judgment delivered in the Court of Appeal affirms what I have always thought was the law, namely, that a covenant between persons interested in a particular trade for the purpose of keeping the trade as far as possible among themselves, and perhaps incidentally of keeping up the prices, or, as I would prefer to put it, not cutting down the prices to a low level, is perfectly legitimate, provided that the parties to the covenant do no more than is necessary or reasonable to effect the object they have in view. And my comment on the decision in *Urmston* v. *Whitelegg Brothers* (1), and on the authorities generally, is this—The test of validity is reasonableness—that is not my own observation, but I adopt it as my own—and I cannot imagine a more unreasonable contract or agreement than that in *Urmston* v. *Whitelegg* (1). There was no limit as to what we are in the habit of calling space, and the limit as to time, instead of being six months as here, was the very considerable period of ten years. There was no clause enabling a party to retire from the agreement. In my judgment Messrs. Daly & Co., Ltd., cannot escape their obligations under this deed on the ground that the contract embodied in the deed is unlawful, because it imposes a restraint upon trade, which the Court cannot sanction. Now, in connexion with that remark, I have not overlooked the argument of the Solicitor-General and Mr. James O'Connor, who pressed upon me the case of *Mogul Steamship Co.* v. *M'Gregor, Gow, & Co.* (2), in which,

(1) 63 L. T. (N. S.) 455. (On appeal) 55 J. P. 453.

(2) [1892] App. Cas. 25, at p. 39.

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undoubtedly, it was pointed out that the word "unlawful" was capable of being used in two senses—(1) unlawful *per se*, a combination which was so unlawful that it would give rise to an action at the suit of a person injuriously affected, and (2) a combination which, though not unlawful in the sense that it gave rise to an action by a person affected, yet was of such a character as to receive no countenance from a legal tribunal. I recognize that eminent Lords who took part in that decision apparently considered that there might be cases in which Courts would refuse to sanction or enforce a contract or combination which, though not directed against any particular person, or class of persons, and not giving rise to any cause of action by a person or persons incidentally injuriously affected, might yet be injurious to the community as operating in restraint of trade. This case does not appear to me to come within the suggested judicial ban. This is a covenant of co-operation for what may be a brief period between a few local bottlers, operating within a distance of sixteen miles from the General Post Office in the City of Cork, subject to this important exception, that the towns of Midleton and Queenstown are excluded from the ambit of the covenant. To my mind, when the sphere of operations is "cabined, cribbed, confined" within such limits of time and space, when there is no prohibition, and can be no prohibition, against outsiders coming in and competing against any one or all of the persons named as parties to the covenant, the public, at all events, cannot suffer wrong. The public can suffer no injustice, and, in the ordinary sense of the word, cannot be detrimentally affected. The arrangement seems in reality to have been found necessary by a few local bottlers to prevent some of their number obtaining an undue advantage during a short period by selling at unduly low prices. No one was compelled to execute the deed. But, as between the firms or individual traders who executed it, the deed prevented "cutting." A reputation for low prices once gained by a firm or individual trader sometimes lingers for a long time after normal trade prices have been adopted. Having regard to all the facts and circumstances of this case, I am prepared to hold not merely that this contract is not *per se* unlawful, but that it is a legitimate and fair arrangement to which a Court of Equity can give effect without

infringing upon the principles by which the Court is fettered by authority. The prices, no doubt, are prices which impose the maximum prices as the minimum limit. That was stated in evidence, and not contradicted. In other words, the maximum prices which the signatories to the deed were in the habit of getting are the minimum prices set forth in the schedule to the deed. But the evidence in the case satisfies me that all parties concerned, bottlers and their customers, considered the scheduled prices reasonably fair. How does this circumstance affect or injure the public? Outsiders are absolutely free to compete, and if the scheduled prices are too high, the publicans can buy elsewhere. I do not think, then, that the prices can render this contract objectionable.

But there is another clause which if interpreted in the way in which Mr. Ronan and Mr. Matheson asked me to interpret it would, in my opinion, cause a revulsion of feeling. If the 4th clause was to be interpreted as giving to the "righteous," if I may call them so, £5 for every offence committed by the "sinners," then I would have to consider whether it was equitable to enforce the contract against firms in the position of Daly & Company, who have (if I recollect rightly) ten vans upon the road, and who supply the wants of many customers daily. If they were obliged to divide among their colleagues £5 for every dozen bottles of porter, or two dozen of porter, or ten dozen of porter, sold by them at prices lower than the scheduled prices, I personally should in that case have had great difficulty in saying that this was a contract to which equity ought to lend its aid. Mr. Galvin, the solicitor who prepared this deed, and who appears to have been a gentleman of considerable ability and knowledge of law, informed the Association that so far as his views went he did not believe he would be able to frame a deed which would hold water, and enable the members of the Association to recover £5 for each offence. Now, I am not going into the difficult problem of penalties or liquidated damages. What I decide is that, so far as pecuniary relief is concerned, there is only one five pounds to be paid for breach of the agreement. After anxious consideration that is the view I have taken as to the true meaning of the deed, and that is what has reconciled the entire deed

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to my mind as a fair and reasonable deed. To hold that a defaulter was bound to pay £5 for every sale contrary to the terms of the deed might mean ruin to him. And whether it was due to Mr. Galvin's sense of justice, or whatever the reason may have been, to my mind the deed is expressed in such a manner that I should not be justified in holding that it has the far-reaching effect Mr. Ronan and Mr. Matheson seek to attribute to it. Now, let me read the clause :—"In case any of the said companies or persons named in the said first schedule hereto shall commit any breach of the said stipulations and terms hereinbefore set forth, all the other companies and persons named in the said first schedule hereto shall be deemed to have thereby sustained actual and ascertained loss and damage collectively to the extent of five pounds sterling, and it is hereby agreed that any of the companies or persons who shall commit any such breach shall and will upon demand pay to the said Henry J. M'Coy, or such other secretary as aforesaid, the sum of five pounds sterling, to be distributed by him in equal shares amongst the companies and persons named in the said first schedule hereto, other than the company or person who shall have committed such breach."

That means that whoever breaks this agreement is to pay £5. It might have been £100. Suppose it had been : there could have been no question that it was one single amount that was to be paid. It is nothing to me that the parties measure it at £5 ; it may be to their disadvantage ; but as at present advised I can give them no more. If any other interpretation were adopted, clause 3 must have a most oppressive effect :—"Each of the said companies and persons shall and will at any time, when called upon so to do by a resolution passed by the Association, furnish a statement in writing to Henry J. M'Coy, of Coach Street, in the city of Cork, the secretary of the Association, or such other secretary as may be appointed by the said Association, showing the actual prices at which any of the said articles mentioned in the said second schedule hereto have been sold by such company or person within such radius, and will permit the said Henry J. M'Coy, or such other secretary as aforesaid, to inspect the books of such company or person, for the purpose of verifying such statement." Just take the case of the defendants. They have

retired from the Association; yet day by day and week by week resolutions might be passed directing the secretary of the Association of which they are no longer members to inspect their books and surcharge them with £5 in respect of every sale. The true measure of pecuniary relief to which the plaintiffs are entitled is that measure which I have already indicated. But pecuniary relief is not the only relief to which the plaintiffs are entitled. Am I to allow the defendants to continue to disregard their obligations? I apprehend not. This was, no doubt, an honourable arrangement entered into by an honourable firm. I think the contract rested on the sanction of legitimate and binding co-operation rather than on penalty or liability to damages. I think that the defendants had reason to complain of the acts of Cade & Co. in reference to the Opera House contract; but this ought to have made them doubly particular as regards their own conduct, and they ought not to have taken any step which so long as they were liable under the deed could leave them open to the charge of unfair conduct towards the other signatories to the deed. Of course Mr. Mahony stated in the box (and I believed him) that he did not think he was any longer bound by the deed; but he should have taken the very best advice before he came to the conclusion that six months meant one month. I am not very clear in my own mind as to the commercial morality of the sixteen-to-the-gallon bottles. An injunction must go. The only question that remains is one of costs. The action has been forced upon the plaintiffs. The validity of the contract has been absolutely denied. They have succeeded in establishing their rights, and have obtained a decision which is far more valuable than the sum recoverable. It is a decision which declares the right of persons in the position of the plaintiffs to enter into an agreement limited as this agreement was, bounded by reasonable limits of space and time, with a view to protecting local trade as far as it might legitimately be protected. I am therefore of opinion that the plaintiffs are entitled to the costs of this action. The costs of the motion for an injunction pending the trial follow the costs of the action. While I can only give pecuniary relief to the extent of £5, I cannot stand idly by and see the covenant disregarded

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day by day. I shall grant an injunction, but it is only to remain in force for six months or until the defendants are discharged from the obligations of the deed by notice or consent.

Solicitor for the plaintiffs: *William Dunlea.*
Solicitors for the defendants: *J. C. and A. Blake.*

A. E. C.

THE ATTY.-GENERAL FOR IRELAND (HUMPHREYS) *v.* GOVERNORS OF SCHOOLS FOUNDED BY ERASMUS SMITH, ESQ. (1).

Appeal.
1910.
Jan. 12, 13.

(1909. No. 793.)

Information — Relator — Appearance in person — Staying proceedings— Signature to writ and statement of claim—Ord. IV., Rules 1, 2— *Practice.*

In an information at suit of the Attorney-General he alone is recognized by the Court as plaintiff, and the relator must issue the writ and deliver the statement of claim by a solicitor, who (though in accordance with recognized practice he may be selected by the relator) is treated as solicitor for the Attorney-General. Accordingly, when the writ of summons was issued and signed, and the statement of claim signed and delivered by the relator in person, the Court, on the application of the defendants, stayed the proceedings.

The writ and statement of claim in such a case being nullities, a defendant is not precluded from making such an application by having entered an unconditional appearance to the writ.

THIS suit was commenced by writ, entitled, "Between His Majesty's Attorney-General for Ireland at the relation of David Humphreys, plaintiff, and the Governors of the schools founded by Erasmus Smith, Esq., defendants."

It sought to have the trusts of an indenture of the 1st December, 1657, and Letters Patent of the 3rd November, 1667, and a charter of King Charles 2, dated the 26th March, 1669, carried into execution, and consequential relief.

The writ bore the following endorsement:—

"This writ was issued by the said David Humphreys, whose registered address is Gresham Hotel, 21 and 22 Upper O'Connell Street, Dublin, the relator, who resides at Killenaule, in the county Tipperary, and is a parish priest."

(1) Before LORDS JUSTICES HOLMES and CHERRY.

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The statement of claim, entitled in the same way as the writ, was expressed to be delivered on the 18th October, 1909, by the relator, of 21 and 22 Upper O'Connell Street, Dublin, and Killenaule, county Tipperary.

The Attorney-General, before granting his fiat, required the relator to give security for costs. The relator declined to do so and applied for a writ of mandamus to compel the Attorney-General to grant the fiat unconditionally. This both the King's Bench Division (17th December, 1908) and the Court of Appeal (28th January, 1909) refused. Thereupon the relator gave the required security, and the writ and statement of claim were submitted to the Attorney-General, who, by letter, authorized them to be respectively issued and delivered. The writ was served on the 30th July, 1909, and an appearance thereto was entered in due course by the defendants.

The defendants, on the 17th December, 1909, applied to His Honour the Master of the Rolls, to whose Court the action was assigned, for an order staying the proceedings; and an order was made, the curial part of which is as follows:—

"It appearing to the Court that the writ of summons in this action has been issued and signed, and the statement of claim signed and delivered, by the relator alone, who is not a party to this action, and not by or on behalf of the Attorney-General, the sole plaintiff in this action, by a solicitor, or counsel acting on his behalf, this Court doth order that all proceedings in this action be stayed until further order."

The relator appealed.

The Rev. David Humphreys, P.P., the relator in person, in support of the appeal:—

Although I am not plaintiff in the action, I am a party to it. In Order V., Rule 6, with reference to issuing a writ in the Chancery Division, the expression "plaintiff or other party" is used. "Party" is used in the Judicature Acts to describe a person concerned and interested in the proceedings, and who is neither a "plaintiff" nor a "defendant": Daniell's Chancery Practice, 6th ed., 33. Here I am concerned and interested. I am neither

plaintiff nor defendant, and, therefore, I must be a "party." Then where a "party" is suing in person, as I am doing here, he is to put upon every writ he sues out, and upon every pleading he delivers, his name, residence, and address for service: Daniell, 47. I have done that here. Pleadings are to contain the name and address of the party delivering same, if he does not appear by solicitor: Daniell, 389. That has been done here. The proceedings are, therefore, perfectly regular. The Master of the Rolls relied chiefly on the case of *The Attorney-General* v. *Ironmongers' Co.* (1). Lord Langdale, M.R., only objected to the Attorney-General appearing to oppose the information. In this he was apparently wrong, for the Attorney-General, Sir John Campbell (who was soon afterwards made Lord Chancellor of Ireland), said it was the practice of the Attorney-General to appear separately from the relator, and that he had done so in the House of Lords (*Shore* v. *Wilson* (2)), who intimated that it was perfectly regular for him to do so. The proceedings here were all regular. I have the authority of the late Attorney-General to institute them. He required me to give security for costs, and I gave it.

But even if there was irregularity, the defendants have waived it by appearance: *Whitfield* v. *Daly* (3); *Forster* v. *Davies*; *Norden* v. *M'Rae* (4).

This is an honest attempt on my part to redress a public grievance in which my parishioners are deeply interested. The importance of the questions involved cannot be disputed, and it would have been more consistent with propriety for the trustees of public funds to have boldly faced inquiry, instead of trying to evade it by technicality.

Matheson, K.C., The Right Hon. J. H. Campbell, K.C., Jellett, K.C., and *W. G. Gibson*, for the respondents:—

The Governors of Erasmus Smith's Schools are only anxious to have the questions which the Rev. Mr. Humphreys seeks to raise disposed of at the earliest possible time. The writ was issued the

(1) 2 Beav. 313.
(2) 9 Cl. & Fin. 355.
(3) 12 Ir. L. T. Misc. 134.
(4) 25 Ch. D. 19.

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last day of Trinity Sittings and served during the Long Vacation. The defendants' solicitors did not apparently appreciate the defect, and, without consulting counsel, entered an appearance. When the instructions for the defence were sent to counsel, it became apparent that a miscarriage had occurred, and we felt that, desirous as we were to bring the case to trial at the earliest possible date, we could not safely allow the action to proceed on a writ and statement of claim which are absolute nullities. The writ must be endorsed with the address of the plaintiff's solicitor, or of the plaintiff if he sues in person: Order IV., Rules 1, 2. In this case the plaintiff is the Attorney-General, not the Rev. Mr. Humphreys. And, although it may have become the practice for the relator to select the solicitor and counsel who are to conduct the case, this is supposed to be done by the consent of the Attorney-General, and the Court treats the solicitor on record as solicitor for the Attorney-General. But, like every other suitor, the Attorney-General must appear either in person or by solicitor. Order IV. applies to the Attorney-General as well as to any other suitor.

The Attorney-General v. *Ironmongers' Co.* (1) is a clear authority that the Attorney-General is plaintiff in an information, and if he does not appear in person, he must appear by solicitor. The relator, if he be not a solicitor, cannot enter an appearance for the Attorney-General or give his own address on the writ, as such would not comply with Order IV. Lord Langdale in *The Attorney-General* v. *Ironmongers' Co.* (1) says that he could only hear counsel for the relator as counsel for the Attorney-General. And he cites (p. 329) Sir A. Hart's statement in *The Attorney-General* v. *Mayor, &c., of Galway* (2), that "the relator is not looked upon as a party. The Attorney-General is the party." The same learned Judge held in a subsequent case, *The Attorney-General* v. *Wright* (3), that a notice of motion served on behalf of a relator, and not on behalf of the Attorney-General, was irregular. He repeats that relators are not parties to informations. A strong

(1) 2 Beav. 313.
(2) 1 Molloy, 95
(3) 3 Beav. 447.

decision on the point is that of Sir John Romilly, M.R., in *The Attorney-General* v. *Governors of Sherborne Grammar School* (1), where counsel for the Attorney-General was proceeding to open his case as distinct from that of the relator, who appeared by separate counsel. The Master of the Rolls (p. 264) objected, saying that, though the Attorney-General allowed relators to instruct counsel, such counsel appeared for and on behalf of the Attorney-General. What occurred there was, that the Attorney-General's counsel (Sir R. Bethell) withdrew, and left the relator's counsel to conduct the case. The case which most nearly touches the present is *The Attorney-General* v. *Barker* (2), a case of information and bill. There the relator was also a plaintiff. He appeared to argue the case in person, but Lord Cottenham refused to hear him, saying that he could not separate the bill from the information, and as he could not hear the relator in person on behalf of the Attorney-General, he could not hear him as plaintiff in the bill. The most recent case on this subject is *Casgrain* v. *Atlantic and North-West Railway Co.* (3), where Lord Watson says (p. 296), "The Attorney-General was the sole *dominus litis*, and had the same right to control the conduct and settlement of the suit as if there had been no relator." As to the point of waiver, the writ here is not merely irregular, it is a nullity. If the case had gone to trial, it would have been *coram non judice*, and the Master of the Rolls must have dismissed it for want of jurisdiction.

Linehan, for the Attorney-General, said that he was instructed to leave the matter altogether to the discretion of the Court.

Rev. D. Humphreys, in reply:—

If the Attorney-General thinks in his judicial discretion that the case is a proper one for investigation, he is bound *ex debito justitiae* to grant his fiat: *Ex parte Newton* (4). Here the late Attorney-General gave permission to take these proceedings, after fully considering the case. I lodged the required security

(1) 18 Beav. 256.
(2) 4 Myl. & Cr. 262.
(3) [1895] A. C. 282.
(4) 4 El. & Bl. 869.

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for costs. I am liable to costs if the action fails. The present Attorney-General has taken no objection to my conduct of the case, nor has he proposed to take it up himself and prosecute it to a conclusion. His attitude is simply passive. In that situation, when I am substantially the only person interested in maintaining this suit, and am personally responsible for its miscarriage or failure, is it reasonable that I should be denied the right which every other litigant enjoys of conducting his case in person, and be put to the extra expense of employing solicitor and counsel? I submit that to grant this motion would amount to an absolute denial of justice (1).

HOLMES, L.J.:—

The question raised in this appeal is solved by the title of the action. The plaintiff is the Attorney-General, who has been put in motion by Mr. Humphreys, and the action relates to charitable trust property of great value administered by the defendants. The action is undoubtedly one of great importance, both to many of the King's Irish subjects and to the defendants; but the more important it is, the greater the necessity to have the proceedings conducted in strict accordance with the rules of law and practice, as any deviation therefrom might lead, sooner or later, to serious miscarriage. Mr. Humphreys has been induced to move in the matter from the interest he takes in his fellow-countrymen, who he thinks are deprived of rights in the trust property to which they are entitled; and he satisfied the Attorney-General that the suit was a reasonable and proper one. Accordingly the Attorney-General gave what is called his *fiat* for the issue of the writ. The practice in England is for the Attorney-General himself to sign the writ of summons, and I think this was at one time the practice in Ireland. This practice seems to have been departed from in this country; but this is immaterial, as there is no doubt that the Attorney-General authorized the issue of the writ in this action.

(1) During the argument the Lords Justices suggested that the writ and statement of claim might be amended by adding the signature of a solicitor; but the relator declined, on the ground that to do so might prejudice him in conducting the case at the trial in person.

It has been settled beyond the possibility of question that the Attorney-General alone is plaintiff. It is true that he generally permits the relator to select a solicitor to conduct the case; but such person is not the solicitor of the relator, but of the Attorney-General, who remains *dominus litis* throughout the proceedings. No one can issue a writ of summons except the plaintiff in the action or his solicitor. Order IV., Rules 1, 2, and 3, make this clear; and a writ issued by any other person has been frequently set aside. In the writ issued pursuant to the *fiat*, the endorsement required by the rules of law mentioned was not that of either the plaintiff or his solicitor, but of Mr. Humphreys, the relator. An appearance was entered thereto by the defendants, and it is argued that this waived the irregularity. I am of opinion, however, that the writ of summons thus endorsed was a nullity, and, unless amended, would be fatal to the action. The writ was followed by a statement of claim which, under Order XIX., ought to have been signed by either the plaintiff or his solicitor or counsel; and it also was signed by the relator. It would be a matter of course to make an order to amend both documents. Mr. Humphreys has said that he has a solicitor, who was in Court during the hearing of this appeal; and we suggested that the writ should be endorsed as issued by him, and that he should sign the statement of claim. But the relator has told us that he would not accept an order to amend in this way. He says that the course he has taken was with the deliberate object of conducting the action by himself in person—in other words, for the purpose of his becoming *dominus litis* in the place of the Attorney-General. It is well settled that a relator cannot do this. I presume that the reason for the rigid enforcement of this rule by distinguished Judges is that, when a person having no personal interest in a matter that concerns a portion of the public puts the Attorney-General in motion for the benefit of others, the case ought to be presented to the tribunal that is to decide it by professional men, possessing legal knowledge and experience, and capable of assisting a Court in determining it. But whatever be its reason, the rule is clear. I would have preferred an order setting aside the writ and statement of claim without prejudice to the issue of a regular writ pursuant to the *fiat*; but as Mr. Humphreys tells us that he

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does not require this change, we shall simply disallow the appeal.

I am afraid we are going rather far in not giving costs against him; but as an appearance was entered, and he was thus led to incur the expense and trouble of the statement of claim, we shall make no order as to costs.

CHERRY, L.J.:—

I am in rather a difficult position in adjudicating upon this case, inasmuch as I was Attorney-General when the writ was fiated. I would have preferred not to have been a member of the Court which had to decide this appeal; but, as all the Judges of the Court except Lord Justice Holmes and myself are Governors of the Schools, a Court could not otherwise have been formed.

Before the writ was issued it was submitted to me as Attorney-General. I was also sent the statement of claim. I read them both, and it seemed to me that they were regular and properly prepared. I therefore authorized the Rev. gentleman to issue the writ in the form in which it was issued, without determining or attempting to determine the right of a relator to personally conduct proceedings in such cases. The Attorney-General as a plaintiff in an action is in the same position as any other litigant. He cannot authorize anything contrary to the practice and Rules of the Court. His authority can only be an authority to proceed according to the settled practice of the Court, and he must be represented in Court by a barrister or solicitor when he does not appear in person. The relator has no authority to represent him.

In this motion, the signature to the writ by the relator in person, and the endorsement of his address upon it, have been challenged as irregular. If these defects were mere technicalities, we might try to remedy them; but they involve matters of substance. Mr. Humphreys admits that he was advised by a solicitor, and that he deliberately issued the writ himself in person in order that he might himself conduct the case. And thus the real and substantial question is, can a relator appear and argue a case on behalf of the Attorney-General? Numerous

cases were cited by Mr. Matheson to show that he cannot do so. There is one case, *The Attorney-General* v. *Barker* (1), in which the relator was a co-plaintiff with the Attorney-General, and the Lord Chancellor held that as he could not appear for the Attorney-General, he could not be heard on his own behalf. Mr. Humphreys says he is a party. But as a party he can only be heard on some matter personally affecting himself, as, for instance, if there was an application to make him liable to pay costs. On any matter in which he is personally interested he is entitled to be heard. But he is not entitled to argue the case on behalf of the Attorney-General. Lord Justice Holmes has read the Rule as to endorsement of the plaintiff's address. The address endorsed here was the address of the relator, not that of the plaintiff. This might be remedied; but there is no use in doing so, as in face of the view taken by Mr. Humphreys any amendment would be useless.

Solicitors for the defendants: *Maunsell, Darley, & Orpen.*
Solicitor for the Attorney-General: *Joseph E. Mac Dermott.*

W. G.

(1) 4 Myl. & Cr. 262.

Wylie, J.
1910.

May 12.
June 6.

Appeal.
July 19.

In re DOMVILE'S ESTATE.

Land Purchase Code—Land Law (Ireland) Act, 1896, *s.* 35 (1)—*Irish Land Act*, 1909, *ss.* 6, 12 (1)—*Agreement—Refusal of Land Commission to sanction advance applied for—Direction to enter into substituted agreement—Jurisdiction, Estates Commissioners—Bonus—Finance* (1).

An announcement in writing by the Estates Commissioners to a vendor that they "are only prepared to advance" a certain specified sum, less than the amount applied for by a purchase-agreement, renders the agreement void under section 35 of the Land Law (Ireland) Act, 1896. Such an announcement is not a direction by the Land Commission within section 12 (1) of the Irish Land Act, 1909, nor is an agreement consequent thereon between landlord and tenant providing for the payment of the balance of the purchase-money in cash a substituted agreement within the meaning and operation of that sub-section.

Quære: Would the Land Commission have jurisdiction to direct the parties to enter into an agreement to that effect?

Questions of law submitted by the Estates Commissioners at the request of the committee of the estate of the vendor (who was a lunatic), for the decision of the Judicial Commissioner. The

(1) Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), section 35 (1):—"Where an agreement for the purchase of a holding is made after the passing of this Act, and is lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including all rents and arrears existing at such date; but if the advance be refused, the agreement shall be void, and the tenant shall be liable to pay rent and arrears as if the agreement had not been made. Provided that no proceeding in respect of the said rent and arrears existing at the date of the agreement shall be brought pending the carrying out of the sale."

Irish Land Act, 1909 (9 Edw. 7, c. 42), section 6 (1):—"The percentage payable under section 48 of the Act of 1903 shall be calculated at the rate specified in the 1st Schedule to this Act, and, for the purposes of that section, the percentage at the rates so specified shall be deemed to be the percentage under that section; Provided that the percentage payable on the purchase-money of an estate which consists of or includes lands in respect of which there are purchase-agreements entered into, on or before the 24th day of

facts under which these questions arose, and the questions as subsequently amended, will be found fully stated in the judgment of Wylie, J.

Jellett, K.C., for the vendor.

June 6.

WYLIE, J.:—

The questions submitted for my decision in this case arise upon the construction of section 12, sub-section 1, of the Irish Land Law Act of 1909.

The facts are as follows:—In the year 1905 three tenants on the estate, named, respectively, Patrick Murphy, Laurence Cuffe, and Margaret Murphy, agreed with the vendor to purchase their respective holdings for the respective sums of £7981, £5716, and £6176. Patrick Murphy's agreement provided that he would apply for an advance of £7000 and lodge in cash £981, and the other two tenants were to apply for an advance of the entire purchase-money. These agreements were lodged with the Estates Commissioners in June and July, 1905. On the 21st May, 1909, the Estates Commissioners sent to the vendor's solicitors a query sheet containing the following ruling as regards these three holdings:—"The Commissioners are only prepared to advance the

November, 1908, shall (so far as the percentage is payable in respect of the purchase of those lands) be calculated at the rate of 12 per cent., instead of being calculated under this section."

Sub-section 2 enumerates four classes of purchase-agreements which are to be deemed to have been entered into before the 24th November, 1908, within none of which, it was admitted, did the present case come.

Section 12 (1):—"Where by reason of the death of the purchaser, or the transmission of the purchaser's interest in a holding, or in pursuance of a declaration of the Land Commission under section 15 of the Act of 1903 with respect to a sub-tenancy or a sub-divided holding, or in consequence of any direction of the Land Commission, a fresh purchase-agreement is entered into in substitution for an original purchase-agreement previously made, any such fresh agreement shall, for the purposes of this Part of this Act, be deemed to be substituted for the original agreement, and, whenever lodged with the Land Commission, to have been lodged with the Land Commission at the date on which the original agreement was so lodged."

Sub-section 2 deals with sales to the Congested Districts Board or the Land Commission, and admittedly did not affect the present case.

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amounts, as shown in red, for these holdings"; and the amount shown in red opposite each of the holdings was £5000. The three tenants are now prepared to lodge in Court the difference between their respective purchase-moneys and £5000, *i.e.*, Patrick Murphy is prepared to lodge £2981, Laurence Cuffe £716, and Margaret Murphy £1176, and the vendor is willing to carry out a sale on these terms, provided he will receive a bonus of 12 per cent. on the £5000 advanced in each case. It is intended to carry out the sales on these terms by consents endorsed on the respective agreements entered into in 1905 or by entering into fresh agreements; but the vendor being unwilling to sell unless he is assured of getting the 12 per cent. bonus, the following questions have been submitted for my decision:—

1. If a direction is given by the Land Commission pursuant to section 12, sub-section 1, of the Irish Land Act, 1909, and the said sales are proceeded with and completed on the terms above mentioned, will the said several agreements be financed as "pending purchase-agreements," and will the percentage be payable on the amounts advanced at 12 per cent.?

2. If no such direction is given, and the said sales are proceeded with and completed on the terms above mentioned, will the said several agreements be financed as "pending purchase-agreements," and will the percentage be payable on the amounts advanced at 12 per cent.?

3. Was the minute of the Estates Commissioners of the 21st May, 1909, a direction of the Land Commission within the meaning of section 12 (1) of the Irish Land Act, 1909?

4. If the said several arrangements hereinbefore referred to are carried out, will they constitute fresh purchase-agreements entered into in substitution for the original purchase-agreements in consequence of a direction of the Land Commission, within the meaning of section 12 (1) of the Irish Land Act, 1909, and will the said several agreements be financed as "pending agreements," and will the percentage be payable on the amounts advanced at 12 per cent.?

Now, the first question assumes that no direction has yet been given in this case pursuant to section 12, sub-section 1; and I am not even informed whether the Land Commission intend to

give any such direction, or what the nature or terms of such direction may be, yet I am asked by the first question to decide whether, if fresh agreements are entered into, in consequence of a direction which the Estates Commissioners may have no intention of giving, and of the nature and terms of which I have no knowledge, and lodged with the Land Commission, such fresh agreements will be substituted agreements within the meaning of section 12, sub-section 1. Such a question I would not, in my opinion, be justified in either considering or answering, and I decline to answer it.

The second question, as framed, also assumes that no direction has been given by the Land Commission pursuant to section 12, sub-section 1; and, if that were so, of course the sub-section would not apply, and I might almost stop here by answering "No" to the second question.

But counsel for the vendor contended that the minute or ruling above referred to, furnished by the Estates Commissioners to the vendor's solicitors, was itself a "direction" by the Land Commission within the meaning of section 12, sub-section 1, and that these new agreements, if now entered into, would be fresh agreements entered into in substitution for the original agreements in consequence of such "direction" of the Land Commission. Accordingly, questions 3 and 4 have been added by amendment. The minute or ruling in substance states that the Commissioners are only prepared to advance £5000 in respect of each of the holdings. Now, instead of that being a "direction" within the sub-section, it seems to me much more like a refusal to sanction the advance applied for in each case.

Let us see what is the effect of section 12, sub-section 1, of the Act of 1909? It is in these terms—"Where by reason of the death of the purchaser or the transmission of the purchaser's interest in a holding, or in pursuance of a declaration of the Land Commission under section 15 of the Act of 1903, with respect to a sub-tenancy or a subdivided holding, or in consequence of any direction of the Land Commission, a fresh purchase-agreement is entered into in substitution for an original purchase-agreement previously made, any such fresh agreement shall, for the purposes of this Part of this Act, be deemed to be substituted for the

Wylie, J. 1910. *In re* Domville's Estate.

original agreement, and, whenever lodged with the Land Commission, to have been lodged with the Land Commission at the date on which the original agreement was lodged." Now, in order to understand the meaning, purpose, and effect of this subsection, it is, I think, necessary first to ascertain and consider the evils to which it points, and for which it was intended to provide a remedy.

Prior to the Act of 1909, as well as since, it was the practice of the Estates Commissioners to carry through purchase-agreements by fiat and not by vesting order, and if a purchase-agreement was fiated, it had the effect, of course, of vesting the fee-simple in the person who signed the agreement. If, therefore, a tenant who had signed a purchase-agreement, which was lodged in the Land Commission, died before the vesting, the Estates Commissioners could not fiat the agreement, as it would purport to vest the holding in a dead man. They were obliged therefore either to proceed by vesting order, whereby they could vest it in the representative of the deceased without any fresh agreement, or to direct the representative to sign and lodge a fresh agreement in the same terms as the original agreement, and, by fiating that fresh agreement, they vested the holding in the representative. This latter course was the one which the Estates Commissioners in almost every case adopted; but though the fresh agreement was directed to be lodged and fiated, that was done for the purpose of carrying out the original agreement. In the same way, if a purchasing tenant had, subsequently to the lodgment of his agreement and before vesting, sold and assigned the whole or a portion of his holding, and it became necessary therefore to vest the whole in the assignee, or a part in the tenant-purchaser and part in the assignee, the Estates Commissioners, instead of proceeding by vesting order, directed the vendor, who had carriage, to bring in fresh agreements, signed by the assignee for the whole, or by the original tenant-purchaser and his assignee, for their respective parts, the original purchase-money being apportioned between them, and the fresh agreements were fiated, the fresh agreements being thus substituted for the old agreement which was in this way carried out. Again, if the tenant-purchaser had a part of his holding sublet, or if several tenant-purchasers of a holding

were in separate occupation of divided portions of the holding, and the Estates Commissioners thought fit to apply the provisions of section 15 of the Act of 1903, they could not fiat the original agreement; and, instead of proceeding by vesting order, they directed fresh agreements, signed by the several occupiers for their respective portions, to be lodged, the original purchase-money being apportioned, and these fresh agreements were fiated, thus again carrying out the terms of the original agreement.

Now, cases like the above were constantly arising under the Act of 1903, and I have no doubt there were also other cases in which, where the original agreement could not be carried out by fiat, the Estates Commissioners directed fresh agreements to be lodged for the purpose of enabling them to proceed by fiat. But no question or difficulty arose in any of these cases until after the Treasury Regulation changed the bonus from 12 to 3 per cent. in case of agreements entered into after the 24th November, 1908. After that date questions were constantly raised and brought before me to decide, as to whether the date of the original agreement or the date of the fresh agreement was the date for regulating the amount of bonus.

Now, in all such cases it is to be observed that, although fresh agreements were directed to be lodged, and these were the agreements fiated, they were always treated where the terms of purchase were not altered as being in substitution for the original agreement; and in dealing with all questions as to bonus I so treated them.

But there was another class of cases which frequently arose, of which *Blackwood's Estate* (1) is an example, where the Estates Commissioners, having declined to sanction the full advance applied for, so that the original agreement could not be carried out, the parties entered into a new agreement embodying different terms, such, for instance, as an obligation on the part of the tenant to lodge part of the purchase-money in cash, and the new agreement was carried out, either by the lodgment of a consent, or possibly sometimes by a fresh agreement; but in such cases the

(1) [1909] 1 Ir. R. 382.

Wylie, J., 1910.

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Estates Commissioners gave no direction as to what the parties should do, but left them to arrange as they thought fit. In all such cases, including *Blackwood's* (1), I held that the agreement carried out was a new and different agreement from the original agreement, and that the date of the new agreement regulated the bonus. In that I was affirmed by the Court of Appeal in *Blackwood's Estate* (1), but I understand the Court of Appeal seemed to express some doubt as to whether I had not gone too far in the other cases I have referred to.

Now the law and practice being such as I have stated when the Act of 1909 was passed, and as the Act was making a clear distinction between "pending" and "future purchase-agreements," and the provisions applicable thereto, both as to advances and purchase-annuities, and as all the difficulties I have referred to as regards bonus would arise under the new Act with respect to advances and purchase-annuities, it was thought advisable to put an end to all doubt as to the law on the questions above mentioned, and this has been at all events attempted by section 12. Whether the attempt has been successful appears to be doubtful.

But, looking at the section, it is to be observed that it begins by enumerating the four classes of cases I have referred to, viz., death of a purchasing tenant, transmission of purchaser's interest in a holding, the cases of sub-tenancy and of sub-division; and it provides that where, in any of such cases, or in consequence of any direction of the Land Commission, a fresh purchase-agreement is entered into in substitution for an original purchase-agreement previously made, such fresh agreement shall, for the purposes of the Finance Part of the Act, be deemed to be substituted for the original agreement, and, when lodged, be deemed to have been lodged at the date when the original agreement was lodged.

Now what is the meaning of "a fresh purchase-agreement entered into in substitution for an original purchase-agreement"? I think there can be no doubt that, in all the cases specially mentioned in the section, it means a fresh agreement embodying the terms of the original agreement, and entered into by direction of the Land Commission for the purpose of carrying out the

(1) [1909] 1 Ir. R. 382.

original agreement. Has it a different meaning when it is entered into in consequence of any direction of the Land Commission in cases other than those specially mentioned? Does it in such cases include an entirely new agreement embodying different terms of purchase, entered into between the same parties? What right or power have the Estates Commissioners to give any direction to a vendor and tenant-purchaser to substitute for the old agreement an entirely new and different agreement, or to give any direction which would involve as a consequence the entering into a new and different agreement by the parties? These questions may arise hereafter if in any case the Estates Commissioners give such a direction.

In this case I am of opinion that the minute or ruling of the Estates Commissioners, that they would not advance more than £5,000 in each case, was not a "direction" within the meaning of section 12, sub-sect. 1; and that if the new agreements contemplated in this case are now entered into without a "direction" of the Land Commission within the meaning of the section, they will be "future purchase-agreements" within the Act of 1909, and must be financed accordingly.

I therefore answer questions 3 and 4 in the negative.

I only wish to add that I am not to be taken as at present deciding that the provisions of section 12, sub-section 1, apply to the question of bonus at all. The date referred to in the sub-section is the date of lodging the agreement with the Land Commission. There is no reference in this sub-section to the 24th November, 1908, which date is invariably referred to in all provisions expressly dealing with the bonus; and in all cases in which, since the Act of 1909, the question of 12 per cent. bonus has arisen, I have followed my former decisions in giving a 12 per cent. bonus without the aid of section 12, sub-section 1.

Appeal. 1910.

In re DOMVILE'S ESTATE.

July 19.

The vendor appealed (1).

Jellett, K.C., and *J. E. Walsh*, for the appellant:—

If these agreements are carried out, they will be the same agreements as were entered into in 1905, as the purchase-money will be the same, the only modification being the mode in which portion of the purchase-money is to be provided. The cases here are distinguishable from those in *Blackwood's Estate* (2). If the Court is of opinion that, if the sale is carried out, the agreements will be new agreements, they will be fresh agreements entered into in consequence of a direction of the Land Commission within the meaning of section 12, sub-section 1. The query issued by the Estates Commissioners was not a refusal to sanction the advance within the meaning of section 35 of the Act of 1896. They have treated the agreements as still subsisting, as (1) they issued a further query with reference to one of the holdings, and (2) they have since collected interest in lieu of rent from the tenants. The memorandum of the 21st May, 1909, was a direction within the meaning of section 12, sub-section 1, of the Act of 1909. The term is wide enough to embrace every case where a new agreement becomes necessary in consequence of the intervention of the Estates Commissioners. The expression "substitution" in the sub-section implies some difference in the fresh agreement. The limitation placed by Wylie, J., on section 12, sub-section 1, confines the general words of the sub-section to cases where the Estates Commissioners have power to direct the parties to bring in new agreements. The cases specially mentioned in the sub-section clearly involve the entering into of new agreements by the parties. If, apart from the sub-section, the act of the parties in entering into new agreements would be to deprive them of their rights under the old agreements, the Estates Commissioners would have no power to direct the parties to bring in such new agreements. Accordingly, the limitation placed by Wylie, J., on the general words in the sub-section at once disappears.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, THE LORD CHIEF JUSTICE, and LORD JUSTICE HOLMES

(2) [1909] 1 Ir. R. 382.

The Solicitor-General and *J. Linehan*, for the Treasury :—

The minute of the 21st May, 1909, was a refusal to sanction the advances applied for. The old agreements are accordingly void under section 35 of the Act of 1896. There has been no "direction" given by the Land Commission within the meaning of section 12, sub-section 1, of the Act of 1909, and, as a matter of fact, no fresh agreements have been entered into.

THE LORD CHANCELLOR :—

We do not think it necessary to reserve judgment, as we are all of opinion that the decision of Mr. Justice Wylie was quite correct. We express no opinion as to other decisions of Mr. Justice Wylie on other facts. I only deal with the case before us. I go mainly on the ground that section 35 of the Land Law (Ireland) Act, 1896, applies, and the words "the advance" in that section, sub-section 1, mean the advance which has been asked for, and which was here refused by the minute of the 21st May, which stated that the Estates Commissioners were not prepared to advance more than £5000 in each case, which put the vendor in a different pecuniary position from that he would have been in if the advance asked for had been granted.

Further, here the vendor adopts the position that he is not bound at all, and will not go on unless he gets a 12 per cent. bonus; so where is there an agreement at all?

In addition to the circumstance that section 35 of the Act of 1896 applies, I think that section 12, sub-section 1, of the Act of 1909 did not contemplate dealing with bonus. That is borne out by section 6, sub-section 1, which enacts that "the percentage payable under section 48 of the Act of 1903 shall be calculated at the rates specified in the first schedule to this Act, and for the purposes of that section the percentage at the rates so specified shall be deemed to be the percentage under that section." That fixes a scheduled rate, calculated according to the number of years' purchase, instead of the fixed rate of 12 per cent. But there is a proviso that where purchase-agreements were entered into, or are by the section

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The Lord Chancellor.

deemed to have been entered into, on or before the 24th November, 1908, the bonus is to be calculated at 12 per cent.; and by sub-section 2 four specific cases are saved by being deemed to be purchase-agreements entered into on or before that date; and in respect of these, 12 per cent., instead of the scheduled rate, is to be paid. [His Lordship read the sub-section, *ante*, p. 335.] This case does not fall within any of the cases specifically mentioned. It is curious to note that sub-section 2 of section 12 goes back to the bonus to save new agreements entered into at the request of the Land Commission. In sub-section 1 of section 12 the date of the Treasury Order of the 24th November, 1908, is not mentioned. It is only mentioned in sub-section 2 in connexion with cases "in respect of which purchase-agreements have been lodged with the Land Commission on or before the 24th day of November, 1908." I think sub-section 1 does not contemplate dealing with bonus at all. Apt words are used when the question of bonus is contemplated to be dealt with.

I think it is perfectly plain that even if section 35 of the Act of 1896 did not apply, the present case would not come within the words "in consequence of any direction of the Land Commission a fresh purchase-agreement is entered into." I think the principle in *Blackwood's Estate* (1) applies here. Holmes, L.J., pointed out there that section 35 concluded the case. How could the Land Commission, by its direction, enforce the entering into of a new agreement with different results? This is not the case of parties, by the direction of the Land Commission, entering into a new agreement. If a new agreement is entered into here, it will be under the contract of the parties themselves. It would not be putting into new language what already had been agreed upon. The minute of the Estates Commissioners declining to advance more than £5000 is not a direction within the meaning of section 12, sub-section 1.

I think that the decision of Wylie, J., was right, and that the appeal should be dismissed with costs.

(1) [1909] 1 Ir. R. 382, 387.

LORD O'BRIEN, L.C.J.:—

I concur in the decision of the Lord Chancellor, but I am not free from doubt. I prefer to rest my judgment upon section 35 of the Land Law (Ireland) Act, 1896.

HOLMES, L.J.:—

Two questions have been argued on behalf of the appellant. One is that all these agreements, entered into in the year 1905, are still in existence, and that, if a sale takes place, what would be carried out would be these three agreements. It is impossible to yield to this argument. Section 35 of the Land Law (Ireland) Act, 1896, can only be construed as enacting that if the advance asked for is refused, the agreement shall be void altogether. Here the Estates Commissioners refused to advance the sums applied for, thus putting an end to the old agreements. No doubt new agreements might have been made between the landlord and tenants after the advance at first applied for had been refused; but the memorandum of the Estates Commissioners shows that this had not been done.

Section 12 (1) of the Irish Land Act, 1909, gives the appellant no help, inasmuch as there is no direction of the Land Commission to make fresh purchase-agreements, nor any agreements purporting to be made pursuant to such direction.

I therefore agree with the judgment of Mr. Justice Wylie.

Solicitors for the vendor: *Moore, Keily, & Lloyd.*
Solicitor for the Treasury: *Malachy Kelly.*

W. G.

Ross, J.,
for M. R.
1910.
Feb. 23, 24.

MORAN *v.* MORAN.

Deed—Construction—Power of appointment—Trustees—Right to an account.

M. conveyed all his property to his trustees, and after giving directions for the management of the property, and after a trust in favour of his wife, continued: "Subject to the foregoing trust I direct my said trustees to hold all the said trust premises in trust for the support, clothing, maintenance, education, and advancement of all my children, with full power to my said trustees to declare, determine, and appoint, as in their own free discretion, the share or shares, and manner and time or times when any of my said children shall become entitled to any share so appointed to them, and I further empower my said trustees to appoint and convey to any of my said children, which they and the survivors or survivor of them, or the executor or administrator of the last surviving trustee of these presents may select, my farm at Ballyboy, and such chattel property thereon as my said trustees shall think fit, and subject to such charges in favour of the other of my children as the said trustees in their discretion may appoint and charge upon said lands and chattels."

The deed further provided that any child guilty of certain conduct might be excluded by the trustees from all participation in the trust premises, and contained a provision for the distribution of the share of any child who should die intestate and unmarried after "his portion shall have vested in him."

Held, that under the terms of the deed a son of M., to whom no appointment had been made by the trustees, was not entitled to any share of the trust premises.

Held, further, that no misconduct having been proved against the trustees, no account should, in the circumstances of the case, be directed against them.

TRIAL OF ACTION.

By an indenture, dated the 28th October, 1890, William Moran granted and assigned to the defendants, therein referred to as his trustees (and who were his brothers, one being a priest), his farm of land at Ballyboy, East, and all his stock, chattels, moneys and debts due to him, unto the defendants upon trust, to hold the said land and chattels in trust to work the same in the manner therein set forth, and having given directions for the management of the property, and subject to a trust for the support of his wife, he directed the defendants to

hold all the said trust premises "in trust for the support, clothing, maintenance, education, and advancement of all his children, with full power to the defendants to declare, determine, and appoint, as in their own free discretion, the share or shares, and manner and time or times when any of his said children should become entitled to any share so appointed to them"; and he further empowered the defendants "to appoint and convey unto any of the said children, which they and the survivors or survivor of them or the executor or administrator of the last surviving trustee of the said indenture might select," his farm at Ballyboy and such chattel property thereon as the defendants should think fit, and subject to such charges in favour of the others of his children as the defendants in their discretion might appoint and charge upon said lands and chattels: provided, however, that should any of his said children be guilty of disobedience to the reasonable commands of the defendants, or the executor or administrator of the last surviving or continuing trustee, or in any manner be guilty of improper conduct, or become addicted to habits of drunkenness, then, and in such event, he empowered the defendants to exclude such child offending as aforesaid from all or any participation whatever in the said trust premises, or the distribution thereof; and he further empowered and directed the defendants that any child so offending "should be removed from his dwelling"; and he further directed that "should any of his said children happen to die intestate and unmarried after his portion should have vested in him or her," the share of such one should revert to the defendants and be distributed amongst his surviving children in such manner, share, and form as the defendants might appoint.

William Moran, who was in failing health when he executed the said indenture, died on the 29th August, 1891, and his wife soon afterwards executed a release of her rights under the indenture, upon receiving a sum of money from the defendants. In 1898 the defendants appointed the farm of Ballyboy east to John Moran, a son of William Moran, deceased, under the power given them in the indenture. The other children of William Moran, deceased, were—James, who died unmarried and intestate, David (the plaintiff), Mary, John, Thomas, William, and Michael. All these children, except the plaintiff, had received an expensive education, two of them

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being destined for professions. The plaintiff, who had been destined for a farming career, had had no money spent upon his education. On the 8th February, 1907, the plaintiff, who had previously refused a match proposed by the defendants, had married the daughter of a neighbouring farmer, a lady of good character and of his own religion, without the knowledge of the defendants. Upon that occasion the plaintiff had appropriated a large sum of money the proceeds of the sale of cattle which formed part of the property, subject to the trust, for the purpose of carrying out the wedding, which took place in London. Since the marriage the plaintiff had resided with his father-in-law, who had offered to make a suitable settlement upon the plaintiff and his wife if the defendants would appoint a share of the trust property to the plaintiff. This, however, the defendants declined to do. The plaintiff subsequently demanded an account from the defendants, who furnished him with some particulars, but did not furnish him with a full and proper account.

The plaintiff now claimed an account of the trust property and the disposition thereof, and that his share in the trust property be ascertained and paid. The defendants counter-claimed for the value of the cattle so sold by the plaintiff.

Matheson, K.C. (with him *W. G. Gibson*), for the plaintiff.

The plaintiff is entitled to a vested share under the deed. His conduct has not been such as to disentitle him. The words "with full power to my said trustees to declare, determine, and appoint, as in their own free discretion, the share or shares, and manner and time or times when any of my said children shall become entitled to any share so appointed to them," might seem to give the trustees an unlimited power of disposing of the premises, but they must be read in the light of what follows—"And I further empower my said trustees to appoint and convey unto any of my said children, whom they and the survivors or survivor of them or the executor or administrator of the last surviving trustee of these presents may select, my farm at Ballyboy, and such chattel property thereon as my said trustees shall think fit, and subject to such charges in favour of the other of my children as the said trustees in their discretion may appoint." These words would be

meaningless if the defendants were held to take an unlimited general power under what went before. The special power to exclude a child under certain circumstances from a share in the trust premises shows that, apart from the exercise of this power, the children take vested shares. This is further supported by the last clause: "And further, should any of my said children happen to die intestate and unmarried after his portion shall have vested in him or her, I direct that the share of such one shall revert to my trustees and be distributed amongst my surviving children in such manner, share, and form as my said trustees shall appoint." This clearly points to the children taking vested shares in the trust premises. The settlor distinguishes between capital and income.

The plaintiff is the only member of the family who has had no money spent upon his education. In any event we are entitled to an account. It is admitted that the defendants have failed to furnish the plaintiff with any proper account.

The Solicitor-General (*C. A. O'Connor, K.C.*) (with him, *Carrigan, K.C.*, and *Corvan*) at the close of the plaintiff's case asked that the action be dismissed on the ground that it was brought for the purpose of establishing that the plaintiff had a right to a share in the trust property, which was clearly unsustainable, and not really for the purpose of obtaining an account.

Ross, J.:—

The Solicitor-General has at this stage of the proceedings, at the end of the plaintiff's case, called upon me to pronounce my opinion upon the question of law, and declare what I think to be the effect of the deed. He asks me to hold that there has been no misconduct proved against the defendants as trustees, and that under the circumstances it is wholly unnecessary to go into evidence. I must now therefore pronounce my opinion upon the deed. It is an inartistic deed. It seems to me that this deed was executed instead of a will. The settlor gives everything he has to his trustees, namely, his brother the priest, his brother James, and his other brother Patrick. What the testator intended was, that when he died his trustees, who were his own brothers, should take his place and should have practically the

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same power that he had himself during his life. As to the suggestion that there is anything in this deed to show that the settlor intended to deal in a different way with interest and capital, I can find nothing whatsoever to support such a suggestion. After giving directions for the management of the property and after the trust for his wife the settlor goes on to say, "Subject to the foregoing trust I direct my said trustees to hold all the said trust premises in trust for the support, clothing, maintenance, education, and advancement of all my children, with full power to my said trustees to declare, determine, and appoint, as in their own free discretion, the share or shares and manner and time or times when any of my said children shall become entitled to any share so appointed to them." If you stop there, is it possible to argue otherwise than that the fullest and freest discretion is conferred upon the trustees, both as to the amount of the shares and as to the time at which they are to be allotted? The settlor has given the trustees the fullest control, and with this control, if it is fairly exercised, no Court ought to interfere. If the trustees were dealing improperly with the trust property, the Court should certainly interfere and administer it in the best way it could; but there is no misconduct whatever proved against these trustees. Mr. Matheson says, however, that the power is cut down by what follows—"and I further empower my said trustees to appoint and convey unto any of my said children whom they and the survivors or survivor of them or the executor or administrator of the last surviving trustee of these presents may select, my farm at Ballyboy and such chattel property thereon as my said trustees shall think fit, and subject to such charges in favour of the other of my children as the said trustees in their discretion may appoint."

Is there anything in this contrary to what he has said before? Not at all. He has given them a general power, and when he goes on to mention a particular way in which the general power may be used, it is absurd to say that he is cutting down the general power. He goes on to provide that in case any of his children should be guilty of disobedience to the reasonable commands of the trustees, or the executor or administrator of the last surviving or continuing trustee, or in any manner be guilty of improper

conduct or become addicted to habits of drunkenness, then and in such event his trustees may exclude such child offending as aforesaid from all or any right of participation whatsoever in the trust premises or the distribution thereof; and he further empowers his trustees, and directs that any child so offending shall be removed from his dwelling. Here again he leaves the full discretion to his trustees. He is not confining the trustees to these particular cases. It is merely making particular what he has already done in a general form. That being so, I hold that the whole capital is vested in the trustees with power to appoint among the children. They have power to appoint the whole to one. The discretion is absolutely vested in them. There is nothing suggested that is improper in their conduct, though there may be things that we who are not living in the same atmosphere cannot understand. As to the conduct of the plaintiff, I do not say there was anything unreasonable in his refusing the match they pressed upon him, but he offended them in that he then without their consent married the daughter of a neighbouring farmer, and that he took money representing the price of some cattle for the purpose of taking the lady to London, and marrying her there. Why they did not approve of this match I cannot say. The lady seems to me to be a nice young woman, and an excellent wife. I do not know why they did not approve of it, but that is for them. It is not for me. The settlor has given them the power. The present action is wholly unsustainable. It is suggested that the children have a right vested in them at twenty-one. If they had such a right, I could understand the action; but there is nothing in the deed that would have the effect of vesting a share at twenty-one. I therefore accede to the Solicitor-General's request, and I hold as a Judge that there is no evidence to go before me as a juror, and I accordingly dismiss the action. But, under the circumstances, I should like to say a word to the trustees. I do not think it is right in the case of a young man of this kind not to give him some portion of the trust property, and to give it to him now. From the observations of counsel I had expected all kinds of youthful escapades to be proved against him. Nothing was proved against him. He seems to be a respectable young man. He has married a woman who ought to be a credit to the family.

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He has two children. I do not think the young man is really much to blame in what he did, and I feel a great deal of sympathy with him. I think the trustees ought now to wind up the property. They seem to me to have done their best to do for their brother's children what they thought he would have done himself. But I think it is rather a hard case that this young man should get nothing at all; and I think they ought to take into consideration the propriety of immediately exercising the power which I have held that they possess, and overlook the fact of his marrying without consent. But as a lawyer I hold he has no right whatever to bring this action. I must also decide against him on the counter-claim, and give judgment for the amount claimed.

Costs must follow the event. The trustees have heard what I have said. I do not profess to know the particulars of the case as well as they do.

It is insisted that, even if I dismiss the part of the action that claims a vested share, I must grant an account and inquiries as to the trust property. If I had held that the Court should interfere owing to the misconduct of the trustees, or if I had held the plaintiff entitled to some definite share, an account must have been directed. But now that I have decided that there is no misconduct, and that he is entitled to no immediate share, an account would be a futile proceeding, and I refuse to direct any account or inquiry.

Solicitor for the plaintiff: *H. T. Sayers.*
Solicitor for the defendants: *William Frewen.*

A. E. C.

LUCAS *v.* LUCAS.

Barton, J.
1910.
June 11.

Will—Codicil—Construction—Revocation—Charge on lands devised—Substituted devisee—New or additional gift—Contribution pro rata.

By will, a testator devised the lands of Blackacre to his eldest son G., charged with £1000 in favour of testator's daughter, with a gift over of the lands to testator's younger son T. in the event of the death of the elder son without issue, and he devised the lands of Whiteacre (including the lands of L.) to his younger son T., charged with another sum of £1000 in favour of testator's daughter, with a similar gift over of these lands in favour of the elder son G. in the event of the death of the younger son T. without issue, and testator appointed his two sons G. and T. residuary legatees.

By codicil testator provided as follows:—I leave and bequeath the lands of L., which are left to my son T. in my will, to my son G., and also leave him my residuary legatee.

Held, that the effect of the codicil was merely a substitution of the elder son G. for the younger son T. as devisee of the lands of L., and that he took the lands of L., subject, in conjunction with the rest of the lands of Whiteacre originally devised to T. by the will, to the charge of £1000.

By his will, dated 15th November, 1879, a testator devised certain lands in the county of Cork unto his eldest son George Lucas, charged with the sum of £1000 in favour of his daughter, Dora Arabella Lucas (afterwards Mrs. Donovan), and, in case of the death of testator's eldest son George without issue, there was a gift over of the lands so charged in favour of testator's youngest son, Thomas John Rashleigh Lucas.

Testator then devised his lands of Cahir, Moneenamucky, Brittas North, and Brittas South, and his lands of Lackenduff South, and Lackenduff North, in the county of Cork, unto his youngest son, Thomas John Rashleigh, charged with another sum of £1000 in favour of his said daughter Dora Arabella, and in case of the death of Thomas John Rashleigh without issue, there was a gift over of the lands so charged and devised to him in favour of testator's eldest son George, and he appointed his two sons already mentioned his residuary legatees.

Barton, J. 1910. LUCAS *v.* LUCAS.

By codicil, dated 18th November, 1899, testator left and bequeathed the lands of Lackenduff, "which was left to my son Thomas John Lucas in my above will, I now leave to my son George Lucas and his heirs, and also I leave him my residuary legatee."

Testator died 23rd April, 1900, and probate of his will was duly granted on the 4th of October of the same year to George Lucas, one of the executors therein named, the other executor (Thomas John Rashleigh) having renounced.

A summons was issued on 7th May, 1910, by Thomas John Rashleigh Lucas as plaintiff against George Lucas as defendant, for the determination under Order 55, Rule IV., of the following question, viz.: "On the true construction of said will and codicil, are the lands of Lackenduff South and Lackenduff North in the county of Cork, charged with the sum of £1000 and interest?"

A. M. Sullivan, K.C., and *Peart*, for the plaintiff:—

The testator had no intention of revoking the charge placed on the lands of Lackenduff by the will in favour of Mrs. Donovan, and it is clear that it remains undisturbed by the alteration made by the codicil. The principle of construction is that a codicil shall be read so as to effect as little change as possible in the original will, that is to say, all provisions in the will are to stand except such as are plainly inconsistent with the codicil. There is no inconsistency between the continuance of the charge on the lands of Lackenduff and the alteration of the devise of the lands, and therefore all the lands originally devised to plaintiff remain subject to the charge of £1000, and rateably liable to pay it: see Jarman on Wills, p. 140: *Beckett* v. *Harden* (1).

The object of the testator in making the codicil is merely to substitute one devisee of the lands of Lackenduff for another, and he does not intend to discharge these lands from contribution to the charge imposed on them by his will. The codicil deals only with the devise of the land, and the bequest of the £1000 charge is separate and distinct from the devise of the land: *Young* v. *Hassard* (2); *Ravens* v. *Taylor* (3) was decided on the question of

(1) 4 M. & S. 1. (2) 1 Dr. & War. 638. (3) 4 Beav. 425.

intention and is in accordance with the general principle already stated: *Hinchcliffe* v. *Hinchcliffe* (1).

Leech, K.C., and *D. J. O'Brien*, for the defendant:—

The plan of testator's will was to make division of his lands between his two sons, each one of them to be liable to pay a charge of £1000 in favour of their sister, with an executory gift over, on the death of either son without issue of his share of the estate to the other, and both sons by the will are appointed residuary legatees. Then comes the codicil, which shows that testator had come to the conclusion that Thomas John Rashleigh had got too much, and George too little, and so the lands of Lackenduff are subtracted from the gift to the plaintiff and given to George; but the plan of the will is preserved: there is no intention to alter it (except in the one specified way), or to relieve the plaintiff from the burden of the £1000 charge. Everything in the codicil is for the benefit of George, and by it he alone is appointed residuary legatee. There is a new and independent devise to George, and there is no gift over on the failure of his issue. In reality the codicil contains a totally new gift, and not a gift merely in substitution for anything contained in the will, and where there is a gift in a codicil not by way of substitution for that in the will, but distinct and substantive and independent, the incidents of the first gift do not attach to the second: *Chatteris* v. *Young* (2). *Ravens* v. *Taylor* (3) shows that the matter is a question of construction in each case, and here the words of the gift are certain, and full effect must be given to them. The testatrix in *Young* v. *Hassard* (4) merely makes a simple revocation. She says, "I hereby revoke so much of my said will as gives my said lands to my said son Charles"; and so that case does not govern the present at all.

In order to make an additional or substituted legacy subject to the same conditions as the original gift, there must be no inconsistency with the terms of the gift and the scope of the

(1) 2 Dr. & Sm. 96.
(2) 2 Russ. 183.
(3) 4 Beav. 425.
(4) 1 Dr. & War. 638.

Barton, J. 1910.

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rest of the will: *The King* v. *Tootel* (1); *Johnstone* v. *Earl of Harrowby* (2); *Mores' Trusts* (3).

BARTON, J.:—

It has been contended, on behalf of Mr. George Lucas, that the lands of Lackenduff are, under the codicil, left to him free from the charge of £1000, which was imposed upon these and other lands by the will.

On the other side, it has been contended that the provisions of the will must not be disturbed further than is necessary to give full effect to the codicil, and that, as no intention is manifested in the codicil of revoking the charge of £1000 which was put on these lands by the will, they must still be subject to the charge.

Jarman in his treatise on Wills, vol. i., p. 140, summarizes the law thus:—"So where a testator devises lands to A, subject to a charge in favour of B, and then by a codicil revokes the devise to A of the land, which he gives to another, without noticing the charge, the land remains subject to the charge in the hands of the substituted devisee."

That is, I think, a correct statement of the law applicable to this will and codicil, and is supported by the authorities; and the present case must be decided accordingly. I can see no indication in the codicil of any intention of taking the charge off the lands.

The answer to the question in the summons will be, that the lands of Lackenduff are subject to the charge of £1000 rateably with the other lands devised to Thomas John Rashleigh Lucas by the will.

Solicitor for the plaintiff: *Clifford Lloyd.*
Solicitor for the defendant: *Richard W. Doherty.*

R. W. L.

(1) 25 Beav. 23, at p. 25.
(2) 1 De G. F. & J. 183
(3) 10 Hare, 171.

IN THE MATTER OF THE ESTATE OF CHARLES STRATHERNE LONGFORD CLOSE.

Wylie, J.
1910.
July 25, 28

Marriage Settlement—Limitations—Subsequent limitation to the first and other sons of a collateral and the heirs male of their respective bodies in tail male—Several sons—Effect of limitation.

By marriage settlement lands were limited to the use of the first son of the settlor and the heirs of the body of such first son, and, in default of such issue, to the use of the second, third, and every other son of the settlor, and the heirs of his and their body and bodies, severally, and successively, and in remainder one after the other, and, in default of such issue, to the use of the daughters of the settlor as tenants in common and the several and respective heirs of their body. In default of such issue of the settlor, the lands were limited to collaterals, and after limitations to the elder and second brothers of the settlor and their issue male, in trust for his third brother for life with remainder "to his first and other sons, and the heirs male of their respective bodies in tail male." The last limitation took effect. The third brother left several sons. On a question arising as to whether, on the true construction of the limitation, the sons did not all take estates in tail male as joint tenants or tenants in common?

Held, that the eldest son took an estate in tail male to the exclusion of his younger brothers.

QUESTION of law submitted by the Examiner for the decision of the Judicial Commissioner.

The facts appearing from the memorandum of the Examiner, as stated in the judgment of Wylie, J., were as follows:—

By the settlement, dated the 22nd November, 1862, and executed on the marriage of Allan Parker Close with Anne Eliza Gibson, the lands sold in this matter were, in default of issue of that marriage, limited to the use of the first son of the said Allan Parker Close by any after-taken wife, and the heirs of the body of such first son, and, in default of such issue, to the use of the second, third, and every other son of the said Allan Parker Close, and the heirs of his and their body and bodies, severally, and successively, and in remainder one after the other, the eldest of such son and sons, and the heir of his and their body and bodies,

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being always preferred before the younger of such son and sons and the heirs of his and their bodies, and, in default of such issue, to the use of the daughters of the said Allan Parker Close as tenants in common, and the several and respective heirs of their bodies, with cross-remainders. In default of such issue of Allan Parker Close, the settlement next proceeded to limit the lands to collaterals in the following terms:—"In trust for Charles Stratherne Close, the brother of the said Allan Parker Close, for and during the term of his natural life, with remainder to the first and other sons of the said Charles Stratherne Close, and the heirs male of their respective bodies in tail male, and, in default of such issue, in trust for James Burke Close, the next brother of the said Allan Parker Close, for and during the term of his natural life, with remainder to his first and other sons and the heirs male of their respective bodies in tail male, and, in default of such issue, in trust for Henry Close, the third brother of the said Allan Parker Close, for and during the term of his natural life, with remainder to his first and other sons and the heirs male of their respective bodies in tail male, and, in default of such issue, in trust for the said Allan Parker Close, his heirs and assigns."

In the events which happened, the final limitation to the first and other sons of Henry Close and the heirs male of their respective bodies in tail male took effect in December, 1905, and thereupon the vendor in this matter, as the eldest of the five sons of Henry Close, then deceased, conceiving himself to be entitled to the property as tenant in tail male under said limitation, entered into possession of the lands, and sold them to the tenants under the Land Purchase Acts. The title to the purchase-money was now being ruled. The following question was submitted:—Whether, having regard to the fact that the limitation to the first and other sons of Henry Close, and the heirs male of their respective bodies in tail male, *prima facie* gave to those sons as a class estates in tail male as joint-tenants or tenants in common, in the absence of words indicating that they were to take in succession according to seniority, the vendor took an estate in tail male in the entire of the said lands, or whether the vendor and his brothers took estates in tail male, either as tenants in common or as joint-tenants?

W. M. Jellett, K.C., for the vendor :—

The exact point has been decided on the construction of wills. *In re Stauntons, Minors* (1), it was held that, under a bequest of moneys, lent on mortgage, to A for life, with remainder to his "first and other sons," the first son of A took the whole absolutely. See also *Cradock* v. *Cradock* (2) and *Honywood* v. *Honywood* (3). In the latter case Byrne, J., adopted the view that "the limitations to 'the first and other sons' impute that they were to take successively according to priority of birth; it is the abridged language of conveyances." In Stroud's Judicial Dictionary (4) it is stated that a limitation to "first and other sons" imports successive interests, and excludes the idea of a joint-tenancy: *Lewis* v. *Waters* (5). There is no express decision on the point in the case of a deed, but the principle of construction is the same as in the case of a will.

The Solicitor-General (*C. A. O'Connor, K.C.*), for the younger sons of Henry Close :—

There is no doubt, upon the authorities, that if the document creating the settlement were a will, the sons would take estates tail in succession. "There is a distinction between limitations by settlement and limitations by will; in the latter case they are construed according to the intention of the testator . . .; but that mode of construction cannot be applied to a limitation by settlement": *per* Heath, J., in *Blaker* v. *Anscombe* (6), referred to in Norton on Deeds (7). In the case of a deed you must see what is the estate created at law, if the words of limitation are technical and apt. If a limitation to the use of A for life, with remainder to the use of his first and other sons and their respective heirs and assigns, creates a fee-simple estate in the sons as tenants in common, a limitation to his first and other sons and the heirs male of their respective bodies would give the sons estates in tail male as tenants in common : see Williams on Real

(1) 14 Ir. Ch. R. 98.
(2) 4 Jur. N. S. 626.
(3) 89 L. T. 235.
(4) At p. 726.
(5) 6 East, 336.
(6) 1 Bos. & Pul. N. R. 25.
(7) Ed. 1906, at p. 370.

Wylie, J. 1910. *In re* Close's Estate.

Property (1), and Fearne on Contingent Remainders (2). Further, inasmuch as, in the earlier limitations in the present settlement, the settlor expressly limited the lands to his own first, second, third, and every other son and the heirs male of their bodies, severally and successively, and in remainder one after the other, he must be presumed to have meant something different when, in the limitations to the sons of his brothers, he omitted to express that they and their heirs male should take successively and in remainder one after the other.

W. M. Jellett, K.C., in reply :—

The last argument used by the Solicitor-General was dealt with by Sir J. Stuart, V.C., in *Cradock* v. *Cradock* (3). With regard to the principle of construction to be applied, in *In re Friend's Settlement* (4), Farwell, J., says: "This question arises on the construction of a deed, but the authorities show conclusively that the same principles apply in construing a deed and in construing a will. In *Cole* v. *Sewell* (5) Lord St. Leonards says (6): 'It has been insisted that *Doe* v. *Wainewright* (7) is not an authority to rule this case, and that it has not been acted on with respect to deeds; but I cannot agree with this position, for I have always thought that the judges in that case only applied to deeds that sound and sensible construction which had previously been confined to wills.'"

July 28.

Wylie, J. :—

In this case the Examiner has raised a question as to the proper construction of certain limitations contained in a settlement executed on the marriage of Allan Parker Close with Anne Eliza Gibson. [His Lordship stated the facts as above set out.] The question raised is, whether upon the true construction of the limitation to the first and other sons of Henry Close and the heirs male of their respective bodies in tail male, the five sons do not all take estates in tail male as joint-tenants or tenants in common?

(1) Ed. 1896, pp. 133 and 134.
(2) At p. 35.
(3) 4 Jur. N. S., at p. 628.
(4) [1906] 1 Ch. D., at p. 52.
(5) 4 D. & War. 1; 2 H. L. C., 186.
(6) 4 D. & War. 33.
(7) 5 T. R. 427.

Now, if the limitation in this case had been "to the sons" instead of "to the first and other sons," I think it is clear on the authorities that all the sons would take either as joint-tenants for life with several inheritances in tail male or as tenants in common in tail male.

In *De Windt* v. *De Windt* (1), a testator gave all his freehold property to his nephew, J. C. J., and after his death to his sons in tail lawfully begotten, and, in default of such sons, to his cousin, J. H. H., and after his death to his sons lawfully begotten, beginning with the elder. It was contended in argument that the words "beginning with the elder" covered both devises, and that their effect would be to make the sons take in succession. The Lord Chancellor held that the words did not apply to both devises, but only to the latter, and, in construing the first devise, he says: "Now what has he given? Why, after the death of Joseph Clayton Jermyns he has given the estate to his sons in tail lawfully begotten. What does that mean? There are but two meanings that can be put on those words. It may mean to his sons, however numerous, to take as joint-tenants for life with several limitations in tail after the life estate; or that he gives it to them all as tenants in common." But it is quite clear from the judgments in that case that the addition of the words "beginning with the elder" in the second devise, had the effect of making the sons take in succession. It is also quite clear from *Lewis* v. *Waters* (2), and *In re Stauntons, Minors* (3), that a limitation in a will "to first and other sons" imports that they take successively according to seniority, and the Solicitor-General, appearing here for the younger sons, admits that, upon the authorities, if the document I am construing were a will, the sons would take estates tail in succession. No case, however, has been cited in which this exact point has arisen upon the construction of a deed. But if the words "first and other sons" when used in a will, of themselves, import a succession, or show an intention that the sons shall take in succession, it seems to me to follow as a matter of course that the same words used in the same way in a deed must have

(1) L. R. 1 H. L. 87.
(2) 6 East, 335.
(3) 14 Ir. Ch. R. 98.

Wylie, J. 1910.

In re Close's Estate.

the same meaning and effect. In other words, they must in a deed also be taken to express an intention on the part of the settlor that the sons shall take in succession. This being so, I have only to apply the well-settled rule of construction applicable to a deed, as to a will, that effect should be given to the clearly expressed intention of the parties to the instrument if that can be done without infringing any rule of law, and there is no rule of law that I am aware of to prevent me from construing the words of the limitation in question as conferring successive estates tail on the sons of Henry Close, such being, in my opinion, the expressed intention, shown not only by the words themselves but by the deed as a whole.

It was suggested that, because, in the earlier part of the deed, the settlor expressly limited the lands to his own first, second, third, and every other son and the heirs male of their bodies severally and successively and in remainder one after the other, he must be presumed to have meant something different when, in the limitations to the sons of his brothers, he omitted to express that they and their heirs male should take successively and in remainder one after the other. But it may be argued, with equal, if not greater, force, that inasmuch as the limitations in the earlier part of the deed—to his daughters as tenants in common and the several and respective heirs of their bodies—showed that the settlor knew how to limit estates to members of a class simultaneously, he meant something different when he limited the estates to the "first and other sons."

It seems to me that the limitations to the sons of the brothers of the settlor are merely short forms of the limitations to the sons of the settlor in the previous part of the deed, and were so used in order to avoid repetition, their effect and meaning being already explained by the prior limitations.

Besides, I think it is plain upon the face of the deed that the settlor intended the entire settled lands to pass from brother to brother on the failure of issue male of each elder brother, and the proper and ordinary mode of doing this is to give estates in tail male to the first and other sons in succession.

Wylie, J 1910.

In re CLOSE'S ESTATE.

On all these grounds, I am of opinion, and so decide, that the vendor is entitled to the lands sold, to the exclusion of his younger brothers.

Solicitor for the vendor: *R. Noel Guinness.*

Solicitors for the younger sons of Henry Close: *Maxwell Weldon & Co.*

J. E. W.

RE PATRICK NAUGHTEN, DECEASED; NAUGHTEN *v.* NAUGHTEN.

Barton, J. 1909. Dec. 21.

(1909. No. 958.)

Administration—Lands purchased under Land Purchase (Ireland) Acts—Realty or Personalty—Valuation under Intestates Estates Act, 1890 (53 & 54 *Vict. c.* 29)—*Local Registration of Title Act,* 1891, *ss.* 84, 85, 86.

Lands purchased under the Land Purchase (Ireland) Acts, subject to annuities payable to the Irish Land Commission, are for administration purposes to be valued as personalty under section 6, and not as realty under section 5, of the Intestates Estates Act, 1890.

ORIGINATING SUMMONS.

The plaintiff, who was one of the next-of-kin of the deceased, sought to have the real and personal estate of the deceased administered. The deceased had died at Newbridge, county Galway, on 1st April, 1909, intestate, and letters of administration had been granted to the defendant, his widow. The deceased had no children, and the next-of-kin consisted of nephews and nieces. Amongst the property of the deceased were three farms which he had purchased under the provisions of the Land Purchase (Ireland) Acts, subject to annuities payable to the Irish Land Commission, and the only question in dispute was whether those lands for the purpose of the administration of his estate should be valued as realty under section 5, or as personalty under section 6, of the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29).

J. B. Burke, for the plaintiff.

Hynes, for the defendant.

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BARTON, J.:—

The only question in dispute is whether the lands of the intestate, which were freehold registered lands sold under the Land Purchase Acts, should, for the purpose of the Intestates Estates Act, 1890, be valued as realty under section 5, or as personalty under section 6, of that Act.

Section 86, sub-section (2), of the Local Registration of Title (Ireland) Act, 1891, provides that "all enactments relating to chattels real . . . and other matters in relation to the administration of personal estate, and the powers, duties, and liabilities of personal representatives in respect of personal estate, shall apply to such land (*i.e.* freehold registered land sold under the Land Purchase Acts) so far as same are applicable, as if the land were a chattel real"; and sub-section (3) of the same section provides that "in the administration of the assets of a person dying after the commencement of this Act, seised of or entitled to any land to which this part of the Act applies (*i.e.* freehold registered land sold under the Land Purchase Acts), such land shall be administered in the same manner . . . and with the same incidents as if it was personal estate."

The Master of the Rolls in *Longworth* v. *Campbell* (1) made a careful analysis of Part IV. of the Local Registration of Title Act, 1891, and referred (at page 33) to section 86. I beg to refer to that passage in his judgment, and respectfully to adopt it and apply it the present case.

In view of the provisions of section 86, sub-sections (1) and (2), of the Local Registration of Title (Ireland) Act, 1891, I am of opinion that these lands must be valued for the purpose of the Intestates Estates Act, 1890, as personalty under section 6, and not as realty under section 5.

Solicitor for the plaintiff: *W. P. Kelly.*
Solicitor for the defendant: *Anthony J. Fallon.*

W. M'G.

(1) [1910] 1 I. R. 23.

IN THE MATTER OF THE ESTATE OF THOMAS WADE FOOT AND CATHERINE PURDON.

Ross, J.
1910.
Feb. 7, 1

Settlement—Power—Appointment in excess—Appointment and settlement.

Under a power to appoint a rent-charge to the children of a marriage an appointment was made by deed-poll giving a daughter of the marriage an absolute power of appointment, and, in default of appointment, to the said daughter for life, remainder to her husband for life, remainder to the next-of-kin of the daughter. By a deed executed three months subsequent to the execution of the deed-poll the daughter and her husband recited the deed-poll and agreed to postpone the interest taken respectively by them by the deed-poll to a certain other annuity charged on the same lands.

Held, that the deed-poll and the subsequent deed constituted a good appointment and settlement.

FINAL SCHEDULE OF INCUMBRANCES.

By an indenture of marriage settlement, dated 19th January, 1775, between Wade Foot and others, the lands of Shanballymore, held for a term of 800 years, were charged with a yearly rent-charge of £40 to be held upon trust after the decease of the said Wade Foot, to be divided among the issue of the intended marriage, as the said Wade Foot should by his last will in writing or by deed direct.

By an indenture dated 6th March, 1804, made between William Lane and others, reciting an intended marriage between William Lane and Olivia Foot, Wade Foot appointed an annuity or yearly rent-charge of £30, part and parcel of the said annual sum or rent-charge of £40 charged by the deed of 1775, to the said Olivia Foot, and the said indenture further witnessed that the said Olivia Foot, granted unto Walter Paye the said yearly rent-charge or annuity of £30 to hold the same upon the trusts therein declared, namely, to pay the said annuity of £30 to William Lane and his assigns during his life, and after his decease upon trust to pay the same to the said Olivia Foot

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In re FOOT AND PURDON'S ESTATE.

during her life, and after the decease of the survivor of the said William Lane and Olivia Foot, upon trust for the children of the marriage, as the said William Lane should by deed or will appoint, and in default of appointment share and share alike.

There were issue of the marriage of William Lane and Olivia Foot five children, Wade, William, Walter, Margaret, and Lucy. Olivia Foot, otherwise Lane, died in the lifetime of William Lane.

By deed-poll, dated 3rd March, 1857, under the hand and seal of William Lane, after reciting the said settlement of 6th March, 1804, and that the said Lucy was then the wife of Robert A. Harden, and that the said William Lane was desirous of appointing the whole of the annuity or yearly rent-charge of £30 to the said Lucy Harden, for her sole and separate use, the said William Lane, in pursuance of the power of appointment given to him by the indenture of settlement of 6th March, 1804, granted, limited, and appointed that from and after the decease of the said William Lane the said annuity or yearly rent-charge of £30 should remain during the residue of the said term of 800 years upon such trusts as Lucy Harden should from time to time by deed or will appoint, and in default of such appointment in trust for the sole and separate use of the said Lucy Harden during her life, and after her decease in trust for the said Robert A. Harden during his life, and after the death of both of them in trust for such person or persons as would have succeeded to the personal estate of the said Lucy Harden on her dying intestate without leaving a husband.

By indenture dated 18th June, 1857, and made between the said William Lane, Lucy Harden, Robert A. Harden, and others, reciting, among others, the aforesaid deed-poll, and reciting that the said Lucy Harden and Robert A. Harden had consented and agreed to postpone the interests taken by them by the deed-poll, to a certain other annuity of £36 18*s.* 5*d.*, payable to Elizabeth Paye and charged on the same lands, it was witnessed that the said Lucy Harden and Robert A. Harden postponed to the said annuity all present and future claims and demands whatever at law or in equity of them and each of them under or by virtue

of the said indenture of settlement dated 6th March, 1804, and said deed-poll, dated 3rd March, 1857, and the said Lucy Harden and Robert A. Harden covenanted with the said William Lane and the said Elizabeth Paye, that the said annuity of £36 18*s.* 5*d.* should be a good and valid charge in priority to the interest of the said Lucy Harden and Robert A. Harden, respectively.

Lucy Harden never exercised the power of appointment conferred upon her by the said deed-poll, dated 3rd March, 1857. In 1858 William Lane assigned his life estate in the said annuity of £30 to Thomas Paye. Thomas Paye entered in receipt, and continued to receive the said annuity of £30 up to the death of William Lane in 1864, and subsequently up to 1870 received payments. Subsequent to 1870 no payments were made on foot of the said annuity of £30.

Lucy Harden died on 25th March, 1905, having survived her husband, and leaving seven children, among others Ada B. Wilson, who made a claim in respect of her share of the said annuity of £30.

The vendors in the Land Commission now applied for a declaration that the claim of Ada B. Wilson was barred by the Statute of Limitations, and that the lands were freed and discharged from the said annuity of £30.

Horner, K.C., and *M'Cutcheon*, for the vendors.

Jellett, K.C., and *Chadwick*, for the claimant.

Ross, J.:— Feb. 14.

The lands in this matter are held for a term of 800 years running from 1748. The lands were in 1775 charged with a rent-charge of £40. In 1804, by an indenture made on the marriage of William Lane and Olivia Foot, a rent-charge of £30, being parcel of the said rent-charge of £40, was limited and appointed to Olivia Foot, absolutely, and by the same indenture this rent-charge of £30 was settled on the husband for life, then on the wife, who predeceased her husband, for life then on the children of the marriage, as William Lane the husband should appoint.

There were several children of the marriage, one of whom was Lucy, who married Robert A. Harden. On 3rd March, 1857,

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William Lane made an appointment of the £30 charge in favour of Lucy Harden. A further deed was executed by William Lane, Lucy Harden and her husband, and others, on 18th June, 1857. This latter deed is contended to have the effect of confirming the deed of appointment. No payment on foot of the rent-charge was ever made to Lucy Harden. William Lane died in 1864, and Lucy Harden died in the year 1905, leaving children, who claim the rent-charge from that date.

The question in the case is whether, under these deeds, Lucy Harden took an absolute interest or only a life estate. In the first case the rent-charge is barred by the Statute of Limitations; in the second case the rights of those becoming entitled on the death of Lucy Harden are not affected by the Statute.

In the deed-poll of 3rd March, 1857, it is recited that William Lane is desirous to appoint to the said Lucy Harden the whole of the annuity of £30 for her sole and separate use absolutely and for ever. He then proceeds to direct and appoint that from his death the annuity should be and remain upon such trusts and should from time to time remain and be paid to such persons, and for such purposes, as Lucy Harden should by writing, deed, or will, appoint. And in default of appointment for the sole and separate use of Lucy Harden for her life, and after her death in trust for her husband for life, and after the death of both of them in trust for such persons as would have succeeded to her personal estate on her death intestate without leaving a husband.

The object of the deed of 18th June, 1857, is to postpone in favour of an annuity of £36 18*s.* 5*d.* all interests of Lucy Harden and her husband under the deed-poll of 3rd March, 1857. The deed is recited, and the interests which the deed purports to create are dealt with. Returning to the deed-poll, Lucy Harden herself is the only person mentioned who is an object of the power. Neither her husband nor her next-of-kin are direct objects of the power. It was, however, open to William Lane to appoint the rent-charge to Lucy Harden absolutely, and it was open to her by a contemporaneous settlement to deal in any way with the property so appointed. What can be done by two instruments can be done by one.

In a case where the donee of a power goes a little further and appoints the property to a person who is an object of the power, and to persons who are not objects of the power, a Court of Equity will support the transaction where it is done in good faith, and where it is satisfied that the person who is an object of the power has agreed that the property should be so settled or dealt with.

In *Daniel* v. *Arkwright* (1) there was a power to appoint among children. An appointment by deed-poll was made to the trustees of a marriage settlement of even date of one of the children, and this was held good.

The deed of the 18th June, 1857, I think, sufficiently indicates the approval of Lucy Harden to the manner in which the property was dealt with by the deed-poll.

That being so, we must treat the deeds as a settlement comprising an estate for life on Lucy Harden, with remainder to her husband, with remainder to her next-of-kin. As the latter class only became entitled in 1905, their claim is unaffected by the Statute and the rent-charge is subsisting.

Solicitors for the vendors: *Cochrane & Co.*
Solicitors for the claimant: *French and French.*

D. M. S.

(1) 2 Hem. & Mill. 95.

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July 12, 18, 19, 20, 26.

GRAY AND CATHCART *v.* THE PROVOST, FELLOWS, AND SCHOLARS OF TRINITY COLLEGE, DUBLIN.

Corporation—University—Charter—Alteration of—Consent of Corporation—Act of majority of Corporation.

Where the Crown has created a corporation by charter it cannot alter or recall the charter except in three cases: 1. where the Crown has in the original charter (or in a subsequent charter made valid by acceptance) expressly reserved power to alter the charter; 2. where the corporation is wholly or partially moribund; 3. where the corporation consents to the alteration.

The Crown, on a true construction of the Trinity College Charters of Elizabeth and 13 Charles I., has no power, save with the consent of the corporation, to alter the provisions of the Charter and the Constitution of Trinity College, Dublin.

Semble, such consent does not require the consent of all the individuals of the corporation, but only that of the majority.

Whatever can be lawfully done by a corporation can be done by the act of the majority of its members.

The majority of the Corporation of Trinity College, Dublin, proposed to affix the corporate seal of the College to an application to the King for a King's Letter altering the constitution of the corporation without the consent and against the protest of a minority.

Held, that the Court ought not to, and could not, restrain the action of the majority.

TRIAL OF ACTION.

The action was brought by the plaintiffs, two of the Senior Fellows of Trinity College, Dublin, against the defendants, the Provost, Fellows, and Scholars of the said College, for an injunction restraining them from affixing the corporate seal of the Corporation of Trinity College to, or otherwise adopting, promoting, and forwarding in the name or on behalf of the said Corporation, without the consent and against the protest of the plaintiffs, a proposed King's Letter or Charter, or Letters Patent, whereby the existing Letters Patent, Charters, or Statutes, under which the said Corporation and the Governing Body thereof

(commonly called the Board) were now constituted, could be surrendered, repealed, or abrogated, and whereby the Governing Body and the Corporation of the said College would be extinguished, or cease to exist, or be superseded by or be merged in, a new and differently constituted Corporation and Governing Body. Secondly, for an injunction restraining the defendants from accepting, or purporting to accept, any such new or supplemental Charter, Letters Patent, or King's Letter, without the consent and against the protest of the plaintiffs.

The defendants by their defence submitted, *inter alia*, that a majority of the Provost, Fellows, and Scholars of the said College had power, on behalf of the Corporation, to apply for the proposed King's Letter, and to accept the same or any other King's Letter which His Majesty might be pleased to grant; that the proposed King's Letter did not contain any provision which would prejudice or interfere with any of the privileges or pecuniary or proprietary rights or interests of the plaintiffs in the property or revenue of the Corporation; and that the plaintiffs had not any such privileges or pecuniary or proprietary rights or interests; and that it was not necessary to have the consent of every member of the Corporation, or of every member of the Governing Body, to the application for the proposed King's Letter and to the acceptance of the proposed King's Letter, or of any other King's Letter which His Majesty might be prepared to grant.

The facts, the Charters of Elizabeth and of Charles I., the Statutes of Trinity College, Dublin, and the changes contemplated in the proposed King's Letter sufficiently appear in the judgment of Ross, J.

Matheson, K.C. (with him, *G. W. Walker, K.C.*, and *Brunskill*), for the plaintiffs:—

In the Charters of Elizabeth and Charles I., no power was reserved to the King to alter anything constituting the Corporation of Trinity College; the only power reserved was the power to make Statutes for the pious and faithful government of the College. A living corporation can only commit suicide by the consent of all the members of the corporation. The Crown cannot

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force a new charter on a corporation when it has already got a charter. It can only do so if part of the corporation is defunct: *The King* v. *Passmore* (1); *The King* v. *Hughes* (2); *The King* v. *Vice-Chancellor of Cambridge University* (3); *The King* v. *Cutbush* (4); *The King* v. *Miller* (5); *Mac Cormack* v. *Queen's University* (6); *Ward* v. *The Society of Attorneys* (7); *Ex parte Society of Attorneys* (8).

Ronan, K.C. (with him *The Right Hon. J. H. Campbell, K.C.*, *Jellett, K.C.*, and *Darley*), for the defendants:—

The Charter does not require the consent of every member of the corporate body. The plaintiffs say they have an absolute veto; they claim the same veto even for the youngest Scholar. The plaintiffs' pecuniary interest can be protected in the King's Letter by a special clause. The only modern analogous case is *Mac Cormack's Case* (6). That was a case where the Senate had already passed the Charter, and it could not be altered then. By the Common Law, the act of the majority is the act of the corporation. The defence in the present action raises the question of the *locus standi* of the plaintiffs. In *Mac Cormack's Case* (6) it was decided that the plaintiffs had no *locus standi*. The usage and course of action under an old document are conclusive as to its meaning.

How does a corporation act? The majority of the individuals of the corporation express the will of the corporation: Blackstone, 15th edition, vol. i., 468; Brooks' Abridgment, 31, 34; Lindley on Companies, vol. i. 435; Comyn's Digest, Title Franchises, 342. The major part may do any corporate act, though nothing be mentioned in the charter: Bacon's Abridgment, ii., 269; *The King* v. *Varlo* (9). In *Ward* v. *The Society of Attorneys* (7) it was proposed to take private property and hand it over to a public body. Are the plaintiffs entitled to object to the scheme

(1) 3 T. R. 199.
(2) 7 B. & C. 708.
(3) 3 Burr. 1647.
(4) 4 Burr. 2204.
(5) 6 T. R. 268.
(6) 1. R. 1 Eq. 160.
(7) 1 Coll. 370.
(8) L. R. 8 Ch. App. 163.
(9) Cowper's Rep. 248.

when they do not really feel themselves to be pecuniarily affected? Their right to have their pecuniary rights protected does not give them any right to protect other interests. They cannot object to the Charter, *quâ* charter, but only to an infringement of pecuniary rights. This is only an application for a charter. There is no case in the books like it. It would be different if this action were to prevent us accepting a charter. At common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself: *Riche* v. *Ashbury Railway Carriage Co.* (1); *Baroness Wenlock* v. *River Dee Co.* (2). Has any Court power to restrain any person from applying to the King for anything? The right of the subject to petition the Crown is an express provision of the Bill of Rights. For the first time the Court is now asked to restrain the subject from petitioning the King.

The Right Hon. J. H. Campbell, K.C.:—

1. In every charter granted in respect of an institution which is to have a continuous existence, provision is made in the charter itself as to the body, or persons, in whom the right to alter the charter is vested. In some of the charters the right is conferred on the corporate body itself. Under the original Charter of Elizabeth this power to alter the Charter by statutes was given to the Corporation itself. The Charter of Charles I. expressly revoked that, and reserved the power to the Sovereign and his successors for all time.

2. How does a corporation incorporated by charter act? In all the authorities it is laid down that the corporate act of a common law corporation created by charter required for its validity a majority of the votes of the members of the corporation: Halsbury, "Laws of England," vol. viii., 316. In *Ward's Case* (3) the corporation was stereotyped for all time, and could only act by surrendering and getting a new Charter. The Court prevented that, as the property was vested in each of the members of the corporation. The Court has no jurisdiction to stop the corporation

(1) L. R. 9 Exch. 224: 7 H. L. 693. (2) 36 Ch. D. 674.
(3) 1 Coll. 370.

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from asking for a new Charter. The form of the Charter is for the King to decide.

3. As to pecuniary interest, the plaintiffs disclaim asking the Court's protection on the ground of pecuniary interest. How, then, can the Court insist on their pecuniary interest? The defendants are willing that a clause should be inserted protecting the plaintiffs' pecuniary interest. How can it be said that their interest is affected before the contents of the King's Letter are seen? The plaintiffs are crying out before they are hurt.

G. W. Walker, K.C., in reply:—

The King reserved no power to himself to alter the Charter or anything constituting the Corporation of Trinity College. The only power reserved by Charles I. was the power given to the corporation by Queen Elizabeth, of making *statuta* "pro suo Collegio piè et fideliter gubernando." In the language used in the documents, there is always a marked distinction between the Statutes and the Charters. The seal is directed to be used *ad negotia sua*, and cannot be used for any other purpose. The use of the seal being limited, larger powers are negatived: *per* Lindley, L.J., in *London Association of Shipowners* v. *London Docks Committee* (1). The proposed changes involve the extinction of the present corporation. A statutory corporation cannot be touched by a King's Letter: *The King* v. *Miller* (2); *Hoey* v. *M'Farlane* (3). No radical change in the corporation can be made without the consent of every member who has an interest to protect. The defendants are not presenting a memorial on their own behalf, but as the act of the Corporation, which they have no power to do without the consent of the Corporation.

July 26.

Ross, J.:—

This action is brought by the plaintiffs, who are two of the Senior Fellows of Trinity College, Dublin, against the Provost, Fellows, and Scholars of Trinity College, sued as a corporation,

(1) 36 Ch. D. 242, at p. 251. (2) 6 T. R. 268.
(3) 4 C. B. (N. S.), 718.

and against Dr. Anthony Traill, Provost, and the other Senior Fellows as special defendants.

The plaintiffs claim an injunction to restrain the defendants from affixing the corporate seal of the College to an application for a new King's Letter, and to restrain them from promoting and furthering the scheme therein set forth.

Under Queen Elizabeth's Charter, the Provost, Fellows, and Scholars of the College were constituted a corporation with a common seal. All the lands and property of the College were vested in this corporation. Under the statute of Charles I., the Provost and the Senior Fellows were constituted the Governing Body of the College. It was ordained that through this body, commonly called the Board, the affairs of the College should be transacted—that there should be vested in them the appointment of Fellows, Officers, Scholars, and servants, the general government of the College, and the administration of its revenues.

From time to time Charters or Royal Statutes have been granted by the Crown and accepted by the Provost, Fellows, and Scholars. There is no case in which any Charter has been forced on the College without their consent.

There are various offices of emolument in the College that can only be held by Senior Fellows, and the Board is bound to elect from amongst them the Vice-Provost, the Senior Bursar, the Senior Lecturer, and the Registrar.

Under the statutes the election of Junior Fellows is carried out by means of examination. There must be an election for one Fellowship every year, and the candidates must be graduates of the College.

It is plain that the changes contemplated by the promoters of the King's Letter are of a drastic nature. The corporation is altered and an elective element is introduced. The Governing Body is altered and an elective element is introduced. Junior Fellows if elected are eligible to offices of profit to which at present only Senior Fellows are eligible. External examiners may be appointed in substitution for Fellows and Professors to conduct Fellowship and Scholarship examinations. The Board may refuse to elect a Fellow in any year where no sufficient merit in their opinion has been shown. The Board may create

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a tutorial vacancy, and use funds for the appointment of special teachers in the Arts Course. They may omit to hold a Fellowship examination every year. They may elect a Professor to be a Fellow without examination. They may elect Honorary Fellows. They may confer life-pensions on Professors. They may confer retiring pensions on Professors. They may elect Junior Fellows to offices of Bursar, Senior Lecturer, and Registrar. They may enforce retirement in cases of mental infirmity. They may constitute a Divinity School Council composed of nominated and elected members with large powers. They may regain the power of making, amending, and altering statutes originally granted by the Charter of Elizabeth, and reserved to the Crown by the Charter of Charles I.

I have briefly stated the principal changes proposed.

It cannot be denied that these changes affect the constitution of the Corporation. It is no part of my duty to express any opinion on the advisability of making these changes. The Provost and the other special defendants, members of the Board, whose lives have been spent in doing the work of the College, men of the highest capacity and the greatest experience, are in favour of these changes. The majority of the Junior Fellows, the majority of the Scholars, and the majority of the Council adopt the same view.

On the other hand, the very fact that the Rev. Thomas T. Gray and Mr. Cathcart, men whose devotion to Trinity College is so well known, are opposed to these changes is a serious matter, and must make the most confident reformer hesitate. Fortunately it is not for me to determine who is right and who is wrong. My duty is simply to determine certain questions of pure law, without regard to the opinions of the persons concerned, or the ultimate results of the undertaking proposed.

There are no facts in dispute in this action, as it is now before me. In the hearing of the case the area of dispute has been considerably narrowed. There is an area of agreement.

The University Corporation is a creation of the Crown. It exists primarily by the bounty of the Crown under Charter. All

parties will, I think, concur in the following legal propositions relating to such Charters.

When once the Crown has created a corporation by Charter, it cannot alter the Charter; it cannot by a new Charter recall what it has given, unless in three cases.

The first case is where the Crown has in the original Charter (or in a subsequent Charter made valid by acceptance) expressly reserved power to alter the Charter. The second case is where the corporation is wholly or partially moribund. The third case is where the corporation consents to the alteration. In all other cases no new or supplemental Charter can be obtruded. The King cannot derogate from his own grant, or alter in any way the terms of his original Charter.

I now propose to deal with the questions, the subject of contention. It was contended on behalf of the defendants that, in consequence of what has occurred, there is now an unrestricted power in the King to alter, in any way he pleases, the provisions of the Charter and the constitution of the College.

If this contention is sound, it is admitted that the plaintiffs' case is at an end. The entire control of the matter would be in the hands of the Crown. This alleged power was not reserved to the Sovereign in the original Charter of Elizabeth. The Charter reserved no express power to alter its terms or change the constitution. But it is contended by the defendants that a certain power conferred on the Provost and Fellows by the Charter of Elizabeth is an unrestricted power enabling them to alter the constitution. This power was by the Charter of Charles I. re-vested in the Crown.

The Charter of Charles I. was quite as effective as the Charter of Elizabeth, inasmuch as it was accepted by the corporation. Thus, they contend, the power to alter the constitution was surrendered, and it remains in the Crown to this day. Beyond doubt the power originally given to the Provost and Fellows, by the Charter of Elizabeth, whatever it was, became vested in the Crown by the Charter of Charles. But what was the extent and nature of that power?

On behalf of the plaintiffs it is contended that this express power, conferred on the Provost and Fellows, was a mere power

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of administration, and in no way amounted to a power to change the constitution of the College.

I propose first to examine the Charter of Elizabeth. The Queen commands that there shall be one College, the Mother of a University, to last for all time, which shall be called the College of the Sacred and Undivided Trinity near Dublin, founded by Her Serene Majesty Queen Elizabeth. It is to have one Provost, three Fellows in the name of more, and three Scholars in the name of more. It is commanded that the Provost, Fellows, and Scholars, and their successors by right, fact, and name, henceforth are and shall be one body corporate and politic for ever, incorporated and established in the name of the Provost, Fellows, and Scholars. They shall be known by the same name for all future time. This corporate body is to acquire and possess landed property, and is to sue and be sued in its corporate name.

I must here point out that this very corporation, thus constituted by charter 318 years ago, remains in full vigour and life to this day, composed of the same elements and bearing the same name.

The next clause to which I am about to refer is the most important of all clauses bearing on this question. "And further it is our will and command, and by these presents we grant to the said the Provost, Fellows, and their successors, that they themselves henceforth for ever have a common seal, to be used for their business, according to the tenor and true meaning of these our Letters Patent, as shall seem good to the Provost and the majority of the Fellows. Further we grant and permit the Provost and Fellows of the College, that they make, constitute, and establish laws, statutes, and ordinances for governing their College with piety and fidelity from time to time for ever, and that whatever laws they think well constructed in our Universities of Cambridge and Oxford, and judge to be suitable and useful to themselves, they may establish among themselves."

This clause confers a right only on a part of the corporation, namely, the Provost and Fellows, to use the seal *for their business according to the tenor and true intent* of the Charter. They are to make laws, statutes, and ordinances for *governing the College with*

piety and fidelity and they are to adopt any laws they think suitable from the two English Universities. I confess that I do not see any clear ground for ascertaining the difference between laws, statutes, and ordinances. It is said that laws refer to University regulations as distinguished from College regulations. This was the opinion of some learned authorities, but I know of no warrant for this opinion.

Construing these words as co-ordinate and synonymous, we find the power of making laws, statutes, and ordinances given to the Provost and Fellows. The purpose for which they were given is stated—that is, for the pious and faithful government of the College. But can it be denied that there is a power above all these of altering the Charter or the constitution—and that power is a thing apart, superior and paramount? On the words used in the Elizabethan Charter, I cannot see how any law, statute, or ordinance made by the Provost and Fellows could be operative to alter the position of the officials thereby nominated and appointed, or to affect the powers of the Visitors, or to interfere with the constitution of the corporation created by words so clear and emphatic. We are aware that a code of statutes or ordinances was promulgated by Provost Bedell, afterwards Bishop of Kilmore, and that these were on the model of those of Emmanuel College, Cambridge. These statutes or ordinances are still in existence. The original is still preserved in the Library of Trinity College. In these first appears the distinction between Senior and Junior Fellows. This was afterwards ratified by Patent. These statutes purport to have been made in pursuance of the power given in the Elizabethan Charter.

I now proceed to consider the Letters Patent of Charles I. In the first place, it is to be noticed that there are two principal instruments, and not one only. The first is a Royal Charter addressed "to all to whom these presents may come." The second is a collection of rules or statutes addressed to the Provost, Fellows, and Scholars of Trinity College, who are commanded to obey them.

The Charter recites in the same emphatic language the Charter of Elizabeth forming the corporation. It recites the power of using the seal granted to the Provost and majority of the

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Fellows for their own business according to the Charter and true meaning of the Elizabethan Patent, the power of making laws, statutes, and ordinances. It confirms the Charter. It provides, with the consent of the whole corporation, that the Fellows should not be removed at the end of seven years. After reciting in the same terms the power of making laws, it states that it is the King's will, with the assent and consent of the Provost, Fellows, and Scholars, that the power of making and establishing statutes and ordinances formerly granted to the Provost and Fellows be reserved and continued to the King, his heirs and successors, for ever.

It recites that the Provost and Fellows then existing according to the power granted to them by the late Queen had made and established a body of statutes for the government or regulation of the College, and that it is ascertained that these statutes were not and are not suited to the good government of the College. It ordains that these same statutes, with the consent of the Provost, Fellows, and Scholars of the College, be completely annulled, except in three respects—first, the increase of Fellows and Scholars; second, the distinction between the seven Senior Fellows and the nine Junior Fellows; third, the entrusting of the government of the College to the Provost and the Senior Fellows. It declares that the King has ordered the said statutes to be revised and amended, and confirms the statutes as revised and amended, under the Royal Seal.

The Provost, Fellows, and Scholars are commanded to obey these statutes and no others for ever, unless it shall seem good to the King, his heirs and successors, in accordance with the requirements of the times, to add, repeal, or alter anything, or to dispense with any requirements notwithstanding these statutes. The Charter goes on to declare that whereas various events may arise, all of which it is impossible for human prudence to foresee, the King grants to the Provost, Fellows, and Scholars, that the Provost and the majority of the Senior Fellows may have power to make new decrees and ordinances in cases which have been omitted where there is no precise provision in the statutes. These decrees and ordinances must not be inconsistent with the statutes, and must have the consent of the Visitors.

The Charter goes on to reserve the right of selecting the Provost to the Crown, to provide for vacancies among the Senior Fellows and Junior Fellows, to permit further lands to be held by the College, notwithstanding the Mortmain Acts. All the College property is to be exempted from fiscal impositions.

It is plain that, although a few matters are dealt with that are administrative, and could more properly be dealt with by the statutes, the main portion of this instrument deals with matters that never could have been effected by the laws, statutes, and ordinances of the Elizabethan Charter.

We come now to the second instrument, which is described in the Charter itself as the revised statutes. After an introduction mentioning the annulment of the Bedell statutes, the code is introduced by these words:—"The tenure of our statutes is as follows." Twenty-six statutes follow, providing with extraordinary minuteness for the administration of the College.

Not merely are the duties and qualifications of the Provost, Fellows, and the high officials prescribed, but those of the cook, the porter, and servants.

From the beginning to the end these statutes deal solely with the administration of the College.

The only doubt suggested is in respect of the first statute. It is contended that that statute reforms the Corporation. The words are:—"It is our will that the body of the College consist of the Provost as head, and of the Fellows and Scholars as the superior members of this body."

It is plain that these are not the words that operate to form the Corporation at all. This statute assumes the Corporation to have been formed, and it assigns the rank and position, not only of the members of the Corporation but also of—as it were—inferior members of the body corporate. The Provost is to be head, the Fellows and Scholars are to be superior members of the body, and the cook, the caterer, the cellar-keeper, and the porter are to be a kind of inferior class of members, to supply the wants of the superiors. All these statutes, as I have said, deal with administration alone.

There is a conclusion to the statutes to which my attention was very properly drawn by Mr. Walker, directing them to be

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publicly read each term; that doubtful questions arising on them are to be decided by the Visitors, for whom a rule of interpretation is laid down. The power of the Board, with the consent of the Visitors, to make decrees in omitted cases, where provision has not been made in the statutes, is mentioned.

The Board are exhorted to be very sparing in the use of this power, and only to use it in case of urgent necessity. Three copies of these statutes are to be made—one to be kept among the archives of the College, one in the hands of the Lord Deputy, and one in the hands of the Chancellor of the University. These statutes are signed by Archbishop Laud with his own hand.

Furthermore, we find another instrument directed to the Provost, Fellows, and Scholars, stating that at the request of the College, and on the advice of Thomas Viscount Wentworth, Lord Deputy, the King finds the system for regulating the administration of the College defective, unsuitable, and productive of mischief to the residents; the King directs the new code prepared by Archbishop Laud, and subscribed by his name, to be written out on parchment, and to be marked by the Royal Sign Manual. He directs this book of statutes to be adopted as the code for the rule of the College, and the book of the said statutes to be affixed to the Letters Patent. These last two documents throw light on the whole subject. What was the necessity for the interference of the King in the matter of laws, statutes, and ordinances?

It is plain from these documents that Bedell's statutes were disregarded as wanting in authority and unsuitable; that as a consequence the internal administration of the College was in a state of confusion.

The King's assistance was prayed for, to put things right. The Archbishop, recognizing the vital importance of the matter (for no University or College can prosper when there is no peace), framed these statutes. As soon as they are received, the Provost, Fellows, and Scholars are required to take an oath that they will obey them. This oath is to be solemnly taken in the chapel in the presence of the Visitors. The elaborate methods enjoined for the publication and preservation of the statutes show that the

proper administration of the College was a matter of extreme importance in the opinion of the statesmen of the period. The mischief to be remedied was the disorder in the College.

The conclusion of the whole matter is that the power of making laws, statutes, and ordinances in the Elizabethan Charter is shown by the context to mean the power of making laws for administrative purposes only.

The product of this power and its exemplification are to be found in the Bedell statutes. This power by consent, having been re-vested in the Crown, its product and exemplification are to be found in the Laud statutes. The decrees and ordinances of the Fellows deal with exactly the same subject-matter as the statutes, but are only to be used in cases unprovided for by the statutes. Therefore, the power restored to the Crown by the Charter of Charles I, is not the power to interfere with the constitution.

I have been asked to interpret the ambiguous words in the Charter by usage. This would be a futile proceeding. Hardly any of the statutes can be said to affect the constitution, even in a remote manner, and these were accepted by the Corporation. Hence no assistance is to be derived from this line of investigation. But, taking all the circumstances into account, I see no room for any doubt whatever.

I heard with amazement the argument on this point introduced by counsel for the defendants with a kind of Athanasian dogmatism, imputing intellectual blindness and almost moral obliquity to any person unable to accept it forthwith. A careful examination shows this vaunted argument to be without substance of any kind, and wholly unsustainable.

In this, the first and most important question, I agree in every respect with the contention of the plaintiffs.

I now come to the only other question. Can this Corporation be restrained by injunction from presenting a petition to the King for a King's Letter altering the constitution without the consent of every member of the Corporation?

A corporation created by Charter is one indivisible entity. It has impliedly all the powers of a natural person, save such as are expressly reserved in the charter. It has an inherent right to use

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a seal, even where there are no words of express grant. It can use the seal for all lawful purposes, that is, for all purposes within the scope of its powers. It is not now disputed that it can do so without the consent of every individual member of the corporation, provided such purposes are within the scope of its powers. This is settled by a long series of authorities, extending over four centuries of time.

Whatever can be lawfully done by the corporation can be done by the act of the majority of its members. When the majority authorize the seal to be affixed, the act of the corporation is complete. The question then comes to be this—Is a petition to the King for a Charter altering its constitution a lawful act, and within the scope of its powers? There are many powers inherent in a corporation not mentioned in its Charter. If there is anything that interferes with its action, there is nothing in law to prevent it in its corporate capacity from petitioning the proper authority to remove an obstacle, or to redress a grievance. The right of every subject, whether an individual or a corporation, to apply to the Crown on any matter is founded, to use the words of Lord Lindley, on paramount principles of constitutional law. To make an application is one thing; to grant it is another. We cannot assume that the King will grant the application for an important change, without giving an opportunity to every person affected to be heard. No Court has ever been asked to restrain a subject from making any application to the King. To do so would involve the absurdity of asking the King's Courts to interfere with the King's prerogative. To prevent the King from hearing the application would be wrongful and unconstitutional. It is open to the King to deal with the application as he may think proper. He may refuse it altogether, or he may grant it on such terms as he thinks consistent with justice. Even then a minority of the corporation are—according to high authority—not without a remedy.

This brings me to the consideration of the only reported case to which I intend to refer. It is the case of *Ward* v. *Society of Attorneys* (1), and is a decision of Lord Justice Knight Bruce.

(1) 1 Coll. 370.

Although it was a decision in an interlocutory application, and although its authority has been questioned, I do not see any reason to dissent from the principle laid down. It was a case involving the threatened loss of private property. Every member was the absolute owner of his own share. He had a right to sell it or otherwise dispose of it.

A charter had been granted which would have affected this private property of the plaintiff. He thereupon applied to the Court of Chancery to restrain the corporation from accepting a charter which would have interfered with his property. He contended that to do so would be a breach of trust, and against right. This case was relied on by counsel for the plaintiffs as their sheet-anchor. While I accept the principle for the reasons I have stated, it gives the plaintiffs very little help in any way, and in this present action none at all. In that case the order restrained the corporation from accepting a completed instrument that would have injured the plaintiff's private property.

In this case I am asked to restrain the corporation from making the application for the instrument.

It is laid down in Lord Halsbury's work ("Encyclopædia of English Law," vol. viii., p. 316) that where the majority of the grantees of a charter accept it, the refusal of the minority to accept it will be of no avail against the will of the majority. The only possible exception to that proposition is a case where the individual corporator has a definite interest in the corporation property.

Whether the plaintiffs have such an interest it is not necessary for me now to determine. It is obvious that the plaintiffs' pecuniary interest was of small account in influencing them to take these proceedings. In short, these were not the real reasons, and I think it in their interest to add that, in any possible subsequent proceedings to restrain the Corporation from accepting a new charter, a pecuniary interest would be the only matter that could be taken into consideration in an application to restrain the Corporation from acceptance.

While I hold that the Crown has no power reserved to interfere with this Corporation save in administrative matters, I hold that the Crown has full power to effect changes in the

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constitution with the consent of the Corporation. I am of opinion that such consent does not require the consent of all the individual members of the Corporation, but only that of the majority.

I further hold that this Court ought not and cannot restrain the defendants from making the application to the King. The order of the Court is that the action do stand dismissed.

There is only one other matter to be dealt with, and that is the question of costs. The ordinary rule is, that the costs follow the event. In my opinion there was a great deal to justify the plaintiffs in bringing these matters to the test of a Chancery action. Judges of first instance often desire that on a matter of doubt and difficulty the opinion of higher tribunals should be sought. I have no such desire. If the plaintiffs, after consultation with their most able advisers, are satisfied with this decision, I would venture to suggest, in the interest of peace, which is essential to the prosperity of the University, that the costs of both parties should be paid out of the corporate funds.

Solicitor for the plaintiffs: *T. T. L. Overend.*
Solicitor for the defendants: *F. D. Darley.*

D. M. S.

Barton, J. 1910.

June 17.

Appeal.

July 19.

MONAGHAN RURAL DISTRICT COUNCIL *v.* SMITH.

Local Government—Labourers (Ireland) Act, 1906, s. 31—Labourers (Ireland) Order, 1909, Rule 55—Costs of making title—Taxation.

Section 31 (1) of the Labourers (Ireland) Act, 1906, and Rule 55 of the Labourers (Ireland) Order, 1909, are retrospective, so as to displace the jurisdiction of the Taxing Masters of the High Court, in respect of the taxation of a bill of costs, which was for work done before the passing of the Labourers (Ireland) Act, 1906, and was awaiting taxation at the date of the making the Labourers Order of 1909.

R. (*Lady Mowbray and Stourton*) v. *Local Government Board*, distinguished.

MOTION on behalf of J. Foster Dunwoody, as solicitor for John Smith and others, for a declaration that the costs referred to in the memorandum of reference of Master Mathews, dated

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the 28th January, 1910, be taxed under the Lands Clauses Consolidation Acts, 1845 to 1895, namely, under the schedule of fees of 1895, as allowed by schedule 2 of the Rules of 1884 under the Solicitors' Remuneration Act, 1881.

The costs in question were the costs of John Smith and others of and incidental to the conveyances by them of certain plots of ground taken by the Monaghan Rural District Council for the purpose of erecting labourers' cottages under the Monaghan Rural District Labourers Order, 1906 (Part I). The costs were for work done prior to the passing of the Labourers (Ireland) Act, 1906. A requisition to tax was furnished by Mr. Dunwoody to the Monaghan Rural District Council on the 24th October, 1908, and was signed and sealed by the Council on the 5th July, 1909.

Rule 55 of the Labourers (Ireland) Order, 1906, made in pursuance of section 31 of the Labourers (Ireland) Act, 1906, and the amendment of Rule 55 by the Labourers (Ireland) Order, 1908, which provided for taxation of costs of this kind by a special taxing officer appointed by the Local Government Board, were, in certain respects, admittedly *ultra vires* and void; and there was no valid rule and scale in force until the 2nd July, 1909, when the Labourers (Ireland) Order, 1909, amending Rule 55, came into force.

The costs came on for taxation before Master Mathews on the 11th November, 1909, and 28th January, 1910. Objection was taken to the jurisdiction of the Taxing Master; and the question whether he had jurisdiction or not, in view of the provisions of the above-mentioned Rule, was referred to the Court for decision by a memorandum of reference dated the 28th January, 1910.

Clancy, K.C., for the vendors:—

The costs of making title to the lands which have been compulsorily taken must be taxed under the old rules before a taxing officer of the High Court. The Labourers Act of 1906 came into operation on November 1st of that year. *Lady Mowbray and Stourton's Case* (1) does not decide this case against our contention. In that case Holmes, L.J., says that "until a new scale of fees is prescribed by Rule, the former

(1) 42 I. L. T. R. 255; App. 43 I. L. T. R. 76.

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scale is operative, and until a new taxing authority is appointed, the existing mode of taxation continues"; and Palles, C.B., points out that it was not contended that any valid General Order was in existence at the time of the taxation. These observations apply. See also *Gaussen* v. *Magherafelt R. D. C.* (1), and Bolton's "Labourers Acts," vol. ii., p. 48.

Henry, K.C., for the Rural District Council:—

The Taxing Master has no jurisdiction to tax these costs. The question of these costs is regulated by Rule 55 of the Order of 1909, which is valid under section 31 of the Act of 1906. This Rule is retrospective in operation: *Gaussen* v. *Magherafelt R.D.C.* (1). The principle laid down in *Gaussen's Case* (1) is that legislation affecting procedure (including questions of costs) operates at once, and governs all pending proceedings. The case is also governed by *Rex* (*Lady Mowbray and Stourton*) v. *Local Government Board* (2).

[A report of these cases in the "Gazette of the Incorporated Law Society of Ireland" was cited by counsel during the argument, and is referred to in the judgment.]

BARTON, J.:—

I am of opinion that Mr. Henry's contention is well founded, and that Master Mathews had no jurisdiction to tax these costs. The combined effect of section 31 (1) of the Act of 1906, and of the new Rule 55 of the Labourers Rules, 1909 (3), was to displace the Taxing Master's jurisdiction and to provide a new tribunal, namely, a taxing officer appointed by the Local Government Board. The section and the Order, dealing as they do with matters of procedure, apply to pending proceedings, and apply to the taxation of these costs. *Lady Mowbray and Stourton's Case* (2) is distinguishable, because, in that case, it was held that there was no valid Rule in force at the date of the taxation.

(1) 43 I. L. T. R. 68.

(2) 42 I. L. T. R. 255; App. 43 I. L. T. R. 76.

(3) Labourers (Ireland) Order, 1909, Rule 55: see Bolton's "Labourers Acts," vol. ii., p. 220.

At p. 104 of the "Gazette" report (1), which was used in the arguments, Palles, C.B., said that "it is not pretended that any such General Order" (*i.e.*, a valid General Order) "was in existence at the time these costs were taxed." Mr. Clancy relies upon a sentence in Holmes, L.J.'s, judgment: "Therefore, when Sir George Roche had sent Lady Mowbray and Stourton's costs to the Board, they ought to have been dealt with by a Taxing Master, as before the Act of 1906." Holmes, L.J., does not say that, if a valid Rule were made before the costs came on for taxation, the Taxing Master would have jurisdiction to deal with the costs. But that is the point which arises here. When these costs came before the Taxing Master, there was a valid rule in force, appointing another taxing officer for the taxation of such costs; and I do not see what jurisdiction the Taxing Master had to entertain the taxation. There will be no rule; and, as the Rural District Council signed the requisition to tax by a Taxing Master, after the making of the Order of 1909, there will be no costs.

R. W. L.

Appeal.
July 19.

The vendors appealed.

Clancy, K.C., for the appellants.

S. L. Brown, K.C., for the respondents, was not called on.

The Court of Appeal (THE LORD CHANCELLOR and HOLMES, L.J.) dismissed the appeal with costs.

Solicitor for the vendors: *J. F. Dunwoody.*
Solicitor for the Rural District Council: *D. X. Keenan.*

W. G.

(1) Gazette of the Incorporated Law Society of Ireland (March number), p. 104.

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Oct. 25.

In re BAMFORD, Limited.

Practice—Companies Acts—Winding up—Petitions for winding up—Where several presented, order will be made on petition first presented—Special circumstances may justify departure from the rule.

Where several petitions for the winding up of a company have been presented in different Courts, unless some very special grounds exist, the winding-up order will be made upon the petition first presented.

Semble—A hostile attitude on the part of the petitioners towards other unsecured creditors would amount to such special grounds.

The Official Co-operative Society; *Ex parte M'Donnell* (21 L. R. I. 385) considered.

Petition to Wind up a Company.

Petition on behalf of Pim Brothers, Limited, for the winding-up of Bamford, Limited, the Company the subject of the petition. The Company was incorporated on the 1st July, 1907. On the 8th August, 1910, a debenture was issued by the Company, in favour of Rylands & Son, Limited, as a floating charge. This debenture was issued to secure a pre-existing debt. On the 24th September, 1910, Pim Brothers, Limited, issued a writ against the Company for the amount of a debt of £93 4*s.* 6*d.* due to them by the Company, and on the 5th October, 1910, they recovered judgment for this amount, and, on the same day, the sheriff went into possession of the Company's premises, at the instance of Pim Brothers, Limited. On the 6th October, 1910, notice was served on behalf of Rylands & Son, Limited, on Pim Brothers, Limited, of the appointment of Sir Robert Gardner, as receiver under their debenture. On the 8th October, 1910, Pim Brothers, Limited, presented the present petition for the winding-up of the Company, and on the 10th October, 1910, similar petitions were presented by John Fulton & Co., Limited, who were also creditors of the Company, and by Rylands & Son, Limited, the holders of the debenture above referred to. The petition of Rylands & Sons, Limited, was presented in Mr. Justice Barton's Court, but subsequently transferred to the Court of the Master of the Rolls. On the 11th October, 1910, Pim Brothers, Limited, applied to the Vacation Judge for an order appointing a provisional liquidator to take up possession from the sheriff; but, the receiver having made an

affidavit stating that he was in possession, the Vacation Judge allowed the matter to stand over till the hearing of the petition. After this application the sheriff went out of possession.

Jonathan Pim, K.C., and *Henry Hanna*, for Pim, Brothers, Limited.

The order should be made upon the petition first presented. This is the well-established practice. We are now in the position of unsecured creditors, as the sheriff has been withdrawn. We have no interest hostile to the other unsecured creditors. Hence there are no special circumstances to justify a departure from the usual rule.

Matheson, K.C., and *M'Gonigal*, for Rylands & Son, Limited.

A receiver is in possession and has been regularly appointed. He should be allowed to carry out the sale of the assets, on his undertaking to lodge the proceeds in Court to abide the rights of all parties.

Donaldson, for John Fulton & Co., Limited :—

Our petition was presented second in order of date, but the order should be made upon it. The mere fact of having presented the petition first will not always obtain carriage for the petitioner (see *per* Chatterton, V.-C., in *In re Official Co-operative Society*; *Ex parte M'Donnell* (1)). Rylands & Son are the largest creditors; but the fact that the issue of a debenture to them will have to be investigated in the winding-up renders it undesirable to give carriage to them. Fulton & Co. are the next creditors in amount, and their petition was presented only two days later than that of Pim Brothers, Limited, who have only a small interest in the assets. Besides, they (Pim Brothers) are in the same trade as the company, in the same town, and it may be that some question may arise as to the execution put in by Pim Brothers on the Company's goods.

THE MASTER OF THE ROLLS :—

I am dealing with three petitions, one of which has been transferred to me by Barton, J. The rule in this country has been, and the rule in England has (for many years) been, that, unless some very special grounds exist, the winding-up order should be made upon the petition first presented. If Messrs. Pim were (for example) adopting any hostile attitude towards the

(1) 21 L. R. I. 387.

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other unsecured creditors, I should be slow to give them carriage; but it appears to me that their case is now the same as that of ordinary unsecured creditors, and their counsel so admits. On the 6th October they received notice of the fact that Sir Robert Gardner had been appointed receiver under the debenture held by Rylands & Son, Limited; and accordingly they lost no time in presenting the petition for winding up. They are now relegated to their original rights and are not in any sense secured creditors. It would perhaps be satisfactory if more money happened to be due to them; but the fact that their debt is small is not sufficient to justify me in departing from the settled practice of the Court. I may say with the utmost respect that it is possible that the case cited by Mr. Donaldson, *The Official Co-operative Society, ex parte M'Donnell* (1), would not be followed at the present day, as the practice with reference to transfers from one Judge of the Chancery Division to another has been moulded in accordance with the supreme interest of the public. In this particular case the petition of Mr. Donaldson's client has been transferred to me. I deal with him as if the petition had been originally presented here. Mr. Matheson's client was perfectly justified in believing that it was advisable, if not necessary, to present his petition in order to preserve the assets, and I think it advisable that Sir Robert Gardner should be allowed to remain in possession until the liquidator under the order made on the petition of Messrs. Pim is appointed; but he is not, without further order, to sell the stock. For the rest, my order as to costs is in strict accordance not merely with the settled practice of the Court, but with the still more settled principles of justice and equity.

The order as to costs was as follows:—

"The Court doth declare the several petitioners entitled to their respective costs of the motion and order of the 11th day of October, 1910, and of the hearing of said petition of Pim Brothers, Limited, and this order thereon, and the costs of the said petitions of Fulton & Co., Limited, and Rylands & Son, Limited, as part of their respective costs in this matter, to be taxed as the costs of one hearing."

Solicitors for Pim Brothers, Limited: *Molloy and Molloy.*

Solicitor for Rylands & Son, Limited; *Richard Davoren.*

Solicitors for John Fulton & Co., Limited: *Cleaver and Fulton.*

A. E. C.

(1) 21 L. R. I. 385.

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ATTACHMENT—*continued.*
him till the 18th January, 1910. The Court refused to make an order attaching him for contempt. *Hearne* v. *Tennant* (14 Ves. 136) distinguished. *Century Insurance Co.* v. *Larkin* M. R. 91

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[WYLIE, J., 334; APP. 342

2. —— *Estate "so circumstanced that it would . . . be sold without the consent of the owner as to price" — Date of ascertainment—Land Purchase Acts—Irish Land Act*, 1903, 3 *Edw.* 7, *c.* 37, *s.* 48, *sub-s.* 4.] The date of sale is the date to be applied in considering whether an estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, within the meaning of section 48, sub-section 4, of the Land Act, 1903. An absolute order for the sale of an estate by the Land Judge was in force at the date of the passing of the Land Act, 1903, the estate being then insolvent. The petition for the sale of the estate was dismissed on 11th November, 1903. The owner subsequently took proceedings in the Land Commission, and sold the estate to the tenants under the Act of 1903. At the time of the proceedings and sale in the Land Commission the estate was solvent:—*Held*, affirming the decision of Ross, J., that the exceptions in section 48, sub-section 4, of the Land Act, 1903, did not apply, and that the bonus was payable. *In re Barton's Estate* - - - APP. 100

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3. —— *Final order—Irish Land Act*, 1909, *s.* 6—*Irish Land Act*, 1903, s. 48 — *Application for payment of increased percentage — Sale to Congested Districts Board.*] Section 6 of the Irish Land Act, 1909, does not apply to a case where, before the coming into operation of the Act, a final order was made under the old law fixing the amount of bonus, and payment was made to the vendor of that amount. *In re Knox's Estate*
[WYLIE, J., 66; APP. 68

4. —— *Marriage settlement—Covenant to settle after-acquired property — Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3] Where settled lands are sold under the Land Purchase Acts, the bonus payable to the tenant for life pursuant to the provisions of s. 48 of the Irish Land Act 1903, and s. 3 of the Irish Land Act, 1904, is not captured by a covenant in a marriage settlement, which in terms provides that if vendor then was, or if during coverture she or her husband, in her right, should become seised, or possessed of, or entitled to, any real or personal property of a certain value for any estate or interest whatsoever, then the vendor and all necessary parties should convey, assign, and assure, the said real or personal property to the trustees upon the trusts therein declared. *Tremayne* v. *Rashleigh* ([1908] 1 Ch. D. 681) not followed. *In re Shelton's Estate* WYLIE, J., 161

5. —— *Marriage settlement—Covenant to settle after-acquired property — Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904, (4 Edw. 7, c. 34), s. 3.] The tenant-for-life of lands settled on his first marriage, and afterwards sold by him under the Land Purchase Acts, on his second marriage covenanted with the trustees of the settlement made thereon, that if at any time during the said marriage he should become beneficially entitled to or interested in any property, estate, or effects whatever, he would convey to them all such after-acquired property. On the allocation of the purchase-money of the lands comprised in the first settlement, the percentage payable under section 48 of the Irish Land Act, 1903, was paid to the tenant-for-life, without any objection by the trustees of the second settlement. They subsequently took out a summons to have the question determined whether they were entitled to the percentage so received by the tenant-for-life. *Held*, that the percentage was not after-acquired property within the meaning of the covenant in the settlement, and that the tenant-for-life was entitled to retain it. *In re Shelton's Estate* ([1910] 1 Ir. R. 161) followed. *Herrick* v. *Herrick* - - - - - M.R. 301

BONUS —*continued.*
—— Sale to Congested Districts Board—Originating request for sale to Land Commission lodged prior to 24th November, 1908
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CASES—*Banks* v. *Small* (36 Ch. D. 716) considered - - - - - - - 1
See DISENTAILING DEED.

—— *Boyle* v. *Boyle* (I. R. 11 Eq. 433) followed
See CHARITY. [20

—— *Brown, deceased, In re*; *Brown* v. *Harrison* (35 Ir. L. T. R. 25) not followed 20
See CHARITY.

—— *Ethel and Mitchell's and Butler's Contract, In re* ([1901] 1 Ch. 945) distinguished 1
See DISENTAILING DEED.

—— *Gunning-Moore's Estate, In re* (40 Ir. L. T. R. 224) distinguished - - - 139
See MORTGAGE. 2.

—— *Hall-Dare* v. *Hall-Dare* (31 Ch. D. 251) considered - - - - - 1
See DISENTAILING DEED.

—— *Lambert's Estate, In re*; *Stanton* v. *Lambert* (39 Ch. D. 626) followed - - 95
See HUSBAND AND WIFE. 1.

—— *Leinster's* (*Duke of*) *Settled Estate, In re* (23 L. R. I. 152) distinguished - 139
See MORTGAGE. 2.

—— *M'Evoy* v. *M'Evoy* ([1897] 2 I. R. 295) dissented from - - - - 151
See LEASE.

—— *Maffett, In re* (39 Ch. D. 534) followed and applied - - - - - - 139
See MORTGAGE. 2.

—— *Miles* v. *Harford* (12 Ch. D. 691) applied
See POWER. 2. [220

—— *Mogul Steamship Co.* v. *M'Gregor, Gow, & Co.* ([1892] App. Cas. 25) distinguished 306
See TRADE COMBINATION.

—— *Nepean's Settled Estate, In re* ([1900] 1 I. R. 298) followed and applied - - 139
See MORTGAGE. 2.

—— *Putman* v. *Stevens* (15 East, 505) applied 239
See REAL ESTATE.

—— *R.* (*Fitzwilliam*) v. *Wicklow County Council* (40 Ir. L. T. R. 180) explained - 231
See NOTICE OF SALE.

—— *Ruttledge's Estate, In re* ([1895] 1 I. R. 328) followed - - - - - - 151
See LEASE.

—— *Shelton's Estate, In re* ([1910] 1 I. R. 161) followed - - - - - 301
See BONUS. 5.

CASES—*continued.*
—— *Surman* v. *Wharton* ([1891] 1 Q. B. 491) followed - - - - - - 95
See HUSBAND AND WIFE. 1.

—— *Tobin* v. *Cleary* (I. R. 7 C. L. 17) followed
See SUB-DIVISION. [167

—— *Tremayne* v. *Rashleigh* ([1908] 1 Ch. D. 681) not followed - - - - 161
See BONUS. 4.

—— *Urmston* v. *Whitelegg* (63 L. T. (N.S.) 455; 55 J. P. 453) distinguished - 306
See TRADE COMBINATION.

—— *Yorkshire Railway Wagon Co.* v. *Maclure* (21 Ch. D. 309) applied - - 194, 213
See DEBENTURES.

CHARITY—*Will—Charitable bequest of land—English charity—Death of testator within three months—Failure of gift—7 & 8 Vict. c. 97, s. 16.*] A testatrix bequeathed all her property, of whatsoever nature and kind, to her executors, upon trust to sell same and convert into money, and out of the proceeds to pay debts and certain legacies, and to divide the remainder among certain charities, one of which was Dr. Barnardo's Homes in London. The only property applicable for the discharge of the charitable legacies consisted of a farm of land held under a judicial tenancy. The testator died within three months after making her will. *Held*, that the gift failed. *Boyle* v. *Boyle* (I. R. 11 Eq. 433) followed. *In re Brown, deceased*; *Brown* v. *Harrison* (35 Ir. L. T. R 25) not followed. *In re Knox, deceased*; *Snodygrass* v. *Gamble*.
[BARTON, J., 20

—— Incapacity of trustee—Validity of devise notwithstanding—Scheme - 249
See DISTRIBUTIVE CONSTRUCTION.

CHARTER — *Alteration of Corporation — University — Consent of Corporation — Act of majority of Corporation.*] Where the Crown has created a corporation by charter it cannot alter or recall the charter except in three cases: 1. Where the Crown has in the original charter (or in a subsequent charter made valid by acceptance) expressly reserved power to alter the charter; 2. where the corporation is wholly or partially moribund; 3. where the corporation consents to the alteration. The Crown, on a true construction of the Trinity College Charters of Elizabeth and 13 Charles 1., has no power, save with the consent of the corporation, to alter the provisions of the Charter and the Constitution of Trinity College, Dublin. *Semble*, such consent does not require the consent of all the individuals of the corporation, but only that of the majority. Whatever can be lawfully done by a corporation can be done by the act of the majority of its members. The majority

CHARTER—*continued.*
of the Corporation of Trinity College, Dublin, proposed to affix the corporate seal of the College to an application to the King for a King's Letter altering the constitution of the corporation without the consent and against the protest of a minority. *Held*, that the Court ought not to, and could not, restrain the action of the majority. *Gray and Cathcart* v. *Provost, &c., of Trinity College.*
[Ross, J., 370

CHILDREN — Implied trust in favour of — Marriage settlement - - 47
See IMPLIED TRUST. 1.

—— Implied trust in favour of—Will—Power of deprivation - - - - 116
See IMPLIED TRUST, 2.

—— Joint-tenancy—Will—Default of appointment
See JOINT-TENANCY. [177

COMPANY—Debentures—Power to deal with property—Sale or pledge - 194, 213
See DEBENTURES.

COMPULSORY PURCHASE — Labourers Acts—Instalment mortgage - 135
See MORTGAGE. 1.

CONDITIONS OF SALE—Rates—Apportionment - - - - - - 38
See APPORTIONMENT.

—— Sub-division of holding—Consent - 167
See SUB-DIVISION.

CONGESTED DISTRICTS BOARD—*Land Purchase Acts — Purchase of estate including a town—Re-sale—Advances by Land Commission—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *ss.* 79, 80.] The provisions of the Land Purchase Acts which enable the Land Commission to make advances under the said Acts to tenants for the purchase of their holdings are applicable to cases of agreements by tenants for the purchase, by means of advances under said Acts, of holdings consisting only of houses and premises occupied and used for trading purposes, and situated in a town which forms part of an estate purchased by the Congested Districts Board, under sect. 79 of the Irish Land Act, 1903, provided such tenants are in occupation. Where applications for advances are made by tenants so circumstanced, under sect. 80 of the Irish Land Act, 1903, and the necessary certificate is given by the Congested Districts Board, the Land Commission are, by that section, absolved and prohibited from inquiring into the character of the holdings, or of the sufficiency of the security, and the advances applied for must be made. The powers of the Congested Districts Board to purchase land, and their position with reference to the Land Purchase Acts and Land Purchase Fund in respect of land purchased by them, considered. *In re Congested Districts Board's Estate.*
[WYLIE, J., 55

CONGESTED DISTRICTS BOARD—*contd.*
—— Consent of—Whether necessary in case of sale to Estates Commissioners - 183
See CONGESTED ESTATE.

—— Sale to—Completed prior to Land Act, 1909—Bonus - - - - - - 66, 68
See BONUS. 3.

—— Sale to—Originating request for sale to Land Commission lodged prior to 24th November, 1908—Bonus - - - 183
See CONGESTED ESTATE.

CONGESTED ESTATE — *Land Purchase Acts—Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *ss.* 57 *and* 58—*Estate situated in a congested districts county — Restrictions as to sale of—s.* 58, *sub-s.* 2, *proviso — Construction — Originating request lodged with Land Commission prior to crucial date—Agreement for purchase entered into with Congested Districts Board after crucial date—Bonus — s.* 6, *sub-s.* 2 — *Re-sale — Financing—s.* 13 (*b*) ii—*s.* 3, *sub-s.* 3.] Section 58, sub-section 2, of the Irish Land Act, 1909 (9 Edw. 7, c. 42), has reference only to the sale of an estate by direct sales to tenants and others entitled to purchase holdings or parcels under the Land Purchase Acts, whether such sales are carried out pursuant to an originating application or request, and the absolute and general prohibition contained in sub-section 1 stands unaffected by sub-section 2. Where an originating request has been lodged with a view to the sale of an estate to the Land Commission, prior to the 24th November, 1908, and, subsequently to that date, an agreement for the purchase of the estate is entered into with the Congested Districts Board, such an agreement comes within the scope of section 6, sub-section 2, of the Irish Land Act, 1909, and a bonus of 12 per cent. will be payable. *In re Pringle's Estate* - - WYLIE, J., 183

CONSENT— Of Congested Districts Board to sale - - - - - - 183
See CONGESTED ESTATE.

—— Of Corporation—Alteration of Charter 370
See CHARTER.

—— To sub-division - - - - - 167
See SUB-DIVISION.

CONTEMPT — Attachment — Indorsement on order - - - - - - 91
See ATTACHMENT.

CONTEXT—Will—Construction—Real estate—Residuary legatee - - 239
See REAL ESTATE.

CONVERSION—*Of real estate—Sale for discharge of incumbrances—Surplus proceeds—Realty or personalty.*] An order of the Court, rightfully made for the sale of real estate during the life of the owner, operates as a conversion from the date

CONVERSION—*continued.*

of the order, so that the proceeds are personalty; and after the death of the owner intestate, there is no equity for reconversion as between his heir-at-law and next-of-kin. *In re Stinson's Estate; M'Munn, Petitioner* - Ross, J., 13; APP. 18

2. —— *Will — Construction — "Securities and moneys invested"—Land Purchase Acts—Sale to tenant—Death of landlord—Subsequent sanction of contract for sale.*] By his will a testator devised three species of property under the following descriptions:—(1) "all my real and freehold estates over which I shall have a disposing power at the time of my death whatsoever or wheresoever"; (2) "all my leasehold estates held for any term of years, and all my stocks, funds, securities, and moneys invested and yielding income"; and (3) "all the residue of my personal estate and effects whatsoever and wheresoever." Testator was the absolute owner of certain interests in land in respect of which an originating application for sale under the Land Purchase Acts had been lodged with the Land Commission, together with agreements for purchase, in January, 1905. He died in August, 1905. After his death the sale was sanctioned and carried out, and the purchase-money was paid to his executors:—*Held*, that the proceeds of sale in the hands of the executors were not included in the bequest of "securities and moneys invested and yielding income"; and that same being proceeds of land duly converted into money prior to testator's death, did not pass under the devise of his "real and freehold estate," but fell into the residue, and passed to his residuary legatee. *Jones* v. *Bailey* [BARTON, J. 110

—— **Sale under Land Purchase Acts—Registration of title—Effect of** - - - - 23
See LOCAL REGISTRATION OF TITLE ACT.

CORPORATION — Charter — University—Consent of majority - - - - 370
See CHARTER.

COSTS—Ejectment—Plaintiff successful on issues of law, unsuccessful on issues of fact
See LEASE. [151

—— Labourers Act, 1906, s. 31 — Order 1909 Rule 55—Title—Taxation 386, 389
See TAXATION OF COSTS.

—— Unnecessary grant of administration 95
See HUSBAND AND WIFE. 1.

COVENANT TO SETTLE—Bonus 161, 301
See BONUS. 4, 5.

DATE—Of execution of instrument - 167
See SUBDIVISION.

DEATH—Of several parties—Devise upon 249
See DISTRIBUTIVE CONSTRUCTION.

—— Of testator within three months of will—English charity - - - - 20
See CHARITY.

DEBENTURES—*Limited Company—Clauses restricting pledges and mortgages—Sale or pledge—Notice—Ordinary course of business.*] L. P. & Co., Limited, pot-still whiskey distillers, issued debentures secured by a trust deed which contained a clause making the debentures a floating charge on the assets and undertaking of the Company, and providing that they should not hinder or prevent the Company from selling, alienating, mortgaging, charging, leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of business, and for the purpose of carrying on the same, but that the Company should not create any mortgage or charge ranking in priority to or *pari passu* with the debenture stock. From time to time the Company disposed of raw pot-still whiskey to one *C.* The transactions, of which there were six prior to March, 1906, were treated as sales in the Company's books, and *C.* paid to the Company the full market price for the whiskey. In the case of each lot of whiskey, the Company gave to *C.* a collateral guarantee in the form of a deed poll, in which the whiskey was referred to as "assigned or pledged," the Company undertaking the burden of custody, storage, and insurance, and the whiskey remaining in the Company's bonded warehouse, but being transferred in the Excise books into *C.'s* name. The guarantee contained the following words: "we may or will redeem or repurchase the said whiskey in four years at a profit to you of 10 per cent. simple interest on the price paid." It was proved that this pot-still whiskey took four years to mature, and appreciated during the four years 15 per cent. per annum. The Company went into liquidation, and the debenture-holders obtained the appointment of a receiver, who was also appointed liquidator. *C.* brought an action against the Company and against the receiver and liquidator claiming delivery of the six lots of whiskey which remained in the Company's bonded warehouse, and in the alternative, claiming a declaration that he was entitled to a good and valid pledge, lien, or charge, upon the said whiskey in priority to any claims of the debenture-holders. It was proved at the trial that prior to March, 1906, *C.* had no notice, actual or constructive, of the debentures, or of the contents of the trust deed. *Held*, that the six whiskey transactions were not sales but pledges or mortgages, but that *C.* being a pledgee or mortgagee for value without notice, was entitled to the declaration which he claimed. 2. In March, 1906, *C.* received notice of the debentures and of the restrictive clause in the trust deed. Legal advice was taken, and, in view of the doubts which were raised as to the effect of the six previous transactions, an agreement was drawn up in which the Company agreed, *inter alia*, to relinquish their right to redeem the six lots of whiskey. *Held*, that whatever

DEBENTURES—*continued.*
the effect of this agreement might be as regards the right of redemption, it did not deprive *C.* of any rights which he had acquired as against the debenture-holders, by reason of the previous transactions having been for value and without notice. 3. After March, 1906, the Company disposed of two other lots of whiskey to *C.*, accompanied by a new form of guarantee agreement in which the references to pledge and redemption were struck out, and it was made clear that the whiskey was to be the property of *C.*, and that the Company could not insist on a repurchase, but that *C.* had an option to require the Company to repurchase after the expiration of four years. The agreements were framed under legal advice so as to constitute sales, and transfer the property in the whiskey to *C.* *Held*, that the transactions were not pledges, nor mortgages in disguise; but were sales. *Yorkshire Railway Wagon Co.* v. *Maclure* (21 Ch. D. 309) applied. *Held*, also, that they were transactions "in the ordinary course of the Company's business" within the meaning of the restrictive clause in the debenture trust deed. *Coveney* v. *Persse*
[Barton, J., 194; App. 213

DEED—Construction—Rectification—Supplying words - - - - - - - 1
See Disentailing Deed.

—— Deposit of—Equitable mortgage - 271
See Equitable Mortgage.

DEPOSIT OF TITLE-DEEDS—Land Act, 1903, s. 54 (3)—Restriction on mortgaging
See Equitable Mortgage. [271

DISENTAILING DEED—Habendum—*Rectification—Jurisdiction—Fines and Recoveries (Ireland) Act (4 & 5 Wm. 4, c. 92), s. 45 - 3 & 4 Wm. 4, c. 74, s. 47—Construction—Conveyancing Act*, 1881 (44 & 45 *Vict. c. 41*), *s.* 51.] By a disentailing deed, reciting the creation of a rentcharge to the use of *H. G.* and the heirs male of his body, and that he was then entitled to, and in possession and receipt of, said rentcharge, it was witnessed that the said *H. G.* did, by that deed, intended to be enrolled in the High Court, pursuant to the statute, convey unto *J. L.* all that the said rentcharge so limited to him the said *H. G.* and the heirs male of his body, and all other the premises of which he was seised or entitled as tenant in tail, to hold the same freed and discharged from the estate tail of the said *H. G.*, and all remainders, estates, and powers to take effect after the determination or in defeasance of said estate tail, unto the said *J. L. in fee* to the use of the said *H. G. in fee-simple.* The said deed was duly enrolled:—*Held*, that sect. 45 of the Fines and Recoveries (Ir.) Act (4 & 5 Wm. 4, c. 92)—sect. 47 of 3 & 4 Wm. 4, c. 74—while prohibiting any Court from

DISENTAILING DEED—*continued.*
transforming, by the application of any equitable doctrine, a deed which, according to its legal construction, is ineffective to bar an entail, into a valid disentailing assurance, does not take away the general jurisdiction of a Court of Equity to rectify a disentailing deed, so as to bring its provisions into conformity with the actual intention of the parties; that, having regard to the terms of the deed in question, the words "in fee" were capable of being, and should be, construed as meaning in "fee-simple"; and, accordingly, that, under sect. 51 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the deed was effectual to pass an estate in fee-simple. *Hall-Dare* v. *Hall-Dare* (31 Ch. D. 251) and *Banks* v. *Small* (36 Ch. D. 716) considered. *In re Ethel and Mitchell's and Butler's Contract* ([1901] 1 Ch. 945) distinguished. *In re Ottley's Estate*,
[Wylie, J., 1

DISTRIBUTIVE CONSTRUCTION—*Will—Circumstances indicating intention to disinherit the heir — Construction* reddendo singula singulis.] *M.* by his will left his farm of *F.*, held in fee-simple, to his wife for life, and he gave to her also an annuity of £100 a year for life. He also gave an annuity of £25 a year for life to *H.*, his heiress-at-law, and of £25 a year to his cousin, Margaret *M.*, for her life, and after her death to her niece for life. He also gave to his herd and his wife a house and garden for their lives. "After the death of these parties named in my will, and if my wife has no children of me," he bequeathed all his fee-simple property in *C.*, and the farm of *F.*, to the Church of Ireland Representative Body for the benefit of three parishes, "they to pay all my debts, funeral, and testamentary expenses." The testator left him surviving his widow, and *H.*, his heir-at-law and only next-of-kin. It was estimated that there would be a surplus of £100 yearly out of the fee-simple property in *C.* after paying the annuities. *Held*, that the words "after the death of these parties named in my will, and if my wife has no children of me," should be read distributively, and that the charitable devisees took an immediate interest in the fee-simple lands of *C.* to the extent to which the persons named were not to take under the will. *Held*, also, that the Representative Church Body were devisees in trust, and that their statutory incapacity to take under the devise did not defeat the testator's charitable intention, which would be carried out by means of a scheme. *In re Motherwell*; *Keane* v. *Motherwell*
[Barton, J., 249

ECCLESIASTICAL LEASE—23 & 24 *Vict. c.* 150, *ss.* 26–28—*Notice of period at which lease is renewable—Non-observance of statutory require-*

ECCLESIASTICAL LEASE—*continued.*

ments — Forfeiture.] The Ecclesiastical Commissioners in pursuance of the 23 & 24 Vict. c. 150 s. 26, served notice on a tenant holding under a lease theretofore customarily renewable, fixing triennial periods as those at which the lease was thenceforth to be renewed. The payment of a renewal fine in 1886 equitably renewed the term of twenty-one years created by the lease as and from 25th December, 1886. No renewal fines were paid subsequently to 1886, nor was any renewal applied for within a period of three years and six months from the last renewal. The reversion was sold to the plaintiffs' predecessor in title, subject to the tenant's right of renewal under the 23 & 24 Vict. c. 150. *Held*, that the tenant's right to a renewal was forfeited as and from a date three years and six months subsequent to the date of the last renewal. *Craig* v. *Russell*

[ROSS, J., 104

—— Purchase of perpetuity—Tenant for life—Instalments—Recoupment - - 139
See MORTGAGE. 2.

"EFFECTS"—*Will — Construction — "House and farm"—Inclusion of two holdings held under different contracts of tenancy—Extrinsic Evidence—Oral statement of testator at time of execution of will—Inadmissibility of.*] A testator by his will provided as follows:—"I dispose of my effects in the following manner: I bequeath to my brother *P.* my house and farm, subject to the obligation that he is to pay my wife the sum of £50." Testator had two holdings close together, but not adjoining, situate in different townlands, and held under different contracts of tenancy, but under the same landlord. One of the holdings had a house on it in which the testator was living at the time of his death. According to the evidence both holdings were worked together. *Held*, that both holdings passed to *P.* under the word "farm." *Held*, also, that extrinsic evidence as to an oral statement made by the testator, at the time of the execution of the will, as to what he understood the word "farm" to mean, was not admissible. Decision of Barton, J., affirmed by Court of Appeal. *M'Gonigle* v. *M'Gonigle*

[BARTON, J., 297; APP. 300

EQUITABLE MORTGAGE—*Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54 (3)—*Holding subject to land purchase annuity—Restriction on mortgaging.*] Section 54, subsection 3, of the Irish Land Act, 1903, is confined to instruments of mortgage or charge, and does not apply to an equitable deposit of title-deeds unaccompanied by any writing. *National Bank* v. *Diffely* - - - - - M.R. 271

ESTATE—Congested - - - 183
See CONGESTED ESTATE.

—— Conversion - - - - 13, 18, 110
See CONVERSION. 1, 2.

—— Fee-simple—Deed purporting to bar entail 1
See DISENTAILING DEED.

—— Fee-simple — Marriage settlement—Implied trust - - - - - - 47
See IMPLIED TRUST. 1.

—— In tail—To *A.* for life and after his death to his issue—Will—Construction - 23
See LOCAL REGISTRATION OF TITLE ACT.

—— In tail—"To his first and other sons and the heirs male of their respective bodies in tail male" - - - - - 357
See ESTATE TAIL.

—— Real — "Residuary legatee" — Context — Will—Construction - - - 239
See REAL ESTATE.

ESTATE TAIL—*Marriage settlement—Limitations—Subsequent limitation to the first and other sons of a collateral and the heirs male of their respective bodies in tail male — Several sons —Effect of limitation.*] By marriage settlement lands were limited to the use of the first son of the settlor and the heirs of the body of such first son, and, in default of such issue, to the use of the second, third, and every other son of the settlor, and the heirs of his and their body and bodies, severally, and successively, and in remainder one after the other, and, in default of such issue, to the use of the daughters of the settlor as tenants in common and the several and respective heirs of their body. In default of such issue of the settlor, the lands were limited to collaterals, and after limitations to the elder and second brothers of the settlor and their issue male, in trust for his third brother for life, with remainder "to his first and other sons, and the heirs male of their respective bodies in tail male." The last limitation took effect. The third brother left several sons. On a question arising as to whether, on the true construction of the limitation, the sons did not all take estates in tail male as joint-tenants or tenants in common? *Held*, that the eldest son took an estate in tail male to the exclusion of his younger brothers. *In re Close's Estate*

[WYLIE, J., 357

—— "To *A.* for life, and after his death to his issue—Will—Construction - 23
See LOCAL REGISTRATION OF TITLE ACT.

ESTATES COMMISSIONERS — Advance exceeding £3000—Zones - - 52
See LAND LAW (IRELAND) ACTS.

—— Evicted Tenants Act, 1907—Withdrawal of offer—Pending purchase agreement 76
See EVICTED TENANT.

ESTATES COMMISSIONERS—*continued.*
—— Purchase of congested estate — Consent of Congested Districts Board - - 183
See CONGESTED ESTATE.

—— Refusal to sanction advance applied for — Substituted agreement - 334, 342
See BONUS. 1.

EVICTED TENANT—*Land Purchase Acts — Evicted Tenants (Ireland) Act*, 1907 (7 *Edw.* 7, *c.* 56) *—Lands acquired under—Petition—Statutory agreement—Section* 2 (6) (14)*—Purchase-money—Mode of payment—Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *s.* 3—*Costs.*] All purchases by the Land Commission under the Evicted Tenants (Ireland) Act, 1907, are to be financed in accordance with the provisions of Part I. of the Irish Land Act, 1909, *i.e.* in the case of a "pending purchase-agreement," by payment in cash or 2¾ per cent. stock, at the option of the vendor; and in the case of a "future purchase-agreement," where the Treasury have so directed, by payment in 3 per cent. stock. Where, with a view to the compulsory acquisition of lands under the Evicted Tenants (Ireland) Act, 1907, the Estates Commissioners have gazetted the lands, and made an offer under section 2 (4) of the said Act, and where a petition by the owner has been determined by the Estates Commissioners, and there has been no appeal, on the expiration of the time limited for appeal, there is a completed statutory purchase-agreement within the meaning of section 13 of the Irish Land Act, 1909, unless the power of withdrawal given to the Estates Commissioners by section 2 (14) of the said Act of 1907 is exercisable. The said power of withdrawal is only exercisable where the offer of the Estates Commissioners has been affected by something decided on appeal, either as to the amount of the purchase-money or as to restrictions imposed on the acquisition of the lands. *In re Conyngham's Estate* - WYLIE, J., 76

EVIDENCE—Date of instrument - 167
See SUB-DIVISION.

—— Extrinsic—Alleged ambiguity in will
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EXECUTION OF POWER—Appointment to object on attaining 21 — Intermediate interest - - - - - - 280
See POWER. 3.

—— Excess — Confirmation — Appointment and settlement - - - - - 365
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EXTRINSIC EVIDENCE—Will - 297, 300
See "EFFECTS."

FAIR RENT—Order fixing—Lease for life in being—Devolution of title - 151
See LEASE.

FINES—Renewal—Non-payment - 104
See ECCLESIASTICAL LEASE.

FORFEITURE——Renewal - - 104
See ECCLESIASTICAL LEASE.

HEIR—Words sufficient to disinherit—Will—Construction - - - - - 249
See DISTRIBUTIVE CONSTRUCTION.

HOLDING—Order fixing fair rent—Devolution of title - - - - - 151
See LEASE.

—— Resumption of, by landlord for building 121
See RESUMPTION OF HOLDING.

—— Sale of — Pending Land Purchase agreement—Notice - - - 231
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—— Sub-division—Consent—Conditions of sale
See SUB-DIVISION. [167

—— Subject to land purchase annuity—Equitable mortgage—Land Act, 1903, *s.* 54 (3)
See EQUITABLE MORTGAGE. [271

—— Two holdings worked together by testator—Gift of "my house and farm" 297, 300
See "EFFECTS."

HUSBAND AND WIFE — *Marriage after passing of Married Women's Property Act*, 1882—*Death, without disposing of separate personal estate— Devolution—Title of husband — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (1)—*Costs of administration.*] The Married Women's Property Act, 1882, has not altered the devolution of the undisposed of separate personal estate of a married woman; and accordingly, on the death of a married woman, even if married after the passing of the Act, the husband is entitled, *jure mariti*, to the undisposed of chattels real to which the deceased was entitled for her separate use, and administration is unnecessary to perfect his title. A woman married since the passing of the Married Women's Property Act, 1882, died in 1895, without having disposed of, by will or otherwise, an undivided share in an annuity charged on lands during the residue of a term of years, to which said undivided share she was absolutely entitled in remainder, subject to a life estate therein. On the determination of the life estate in 1907, her husband entered into receipt of said undivided share in said annuity. The lands out of which the said annuity was payable having been sold under the Land Purchase Acts, the husband, without being required to do so, took out administration to his deceased wife, and paid the necessary Crown duties, in order to make title to his share of the redemption price of said annuity:—*Held*, that the costs of taking out administration should not be allowed as against the purchase-money of the lands sold, on the

HUSBAND AND WIFE—*continued.*
grounds (1) that the administration was unnecessary to perfect the husband's title, and (2) that even if administration was necessary, it should have been taken out before entering into receipt of the share of the annuity. *In re Lambert's Estate; Stanton* v. *Lambert* (39 Ch. D. 626), and *Surman* v. *Wharton* ([1891] 1 Q. B. 491) followed. *In re Evans' Estate* - - WYLIE, J., 95

2. —— *Policy of life insurance—Insurance for benefit of wife—Married Women's Property Act*, 1870, *s.* 10—*Assignment by husband during lifetime of wife—Interest or* spes successionis.] Where a trust is created by a policy of insurance expressed to be made by a husband for the benefit of his wife under sect. 10 of the Married Women's Property Act, 1870, the interest of the husband in the policy is (subject to the trust in favour of the wife) an interest capable of assignment by the husband during the lifetime of the wife. A husband in 1882 by a policy expressed to be issued under the Married Women's Property Act, 1870, insured his life "for the sole benefit of his wife, for her separate use under the Married Women's Property Act, 1870," and in 1901, his wife being still alive, assigned to a trustee upon trust for the benefit of his creditors, *inter alia*, all other his personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy. The wife died in 1907. *Held*, that the husband's interest in the policy was captured by the deed of assignment and passed to the trustee subject to the trust in favour of the wife. *Robb* v. *Watson* - - ROSS, J., 243

—— Marriage settlement—Bonus - 161, 301
See BONUS. 4, 5.

—— Marriage settlement—Default of appointment—Implied trust - - 47
See IMPLIED TRUST. 1.

—— Wife's chattels real—Marriage prior to 1883—Purchase by husband of reversion in fee—Merger - - - 86
See MERGER.

ILLEGALITY—Contract—Restraint of trade
See TRADE COMBINATION. [306

IMPLIED TRUST—*Settlement—Rentcharge—Equitable estate—No words of limitation—Estate for life or in fee-simple—Intention.*] By indenture of settlement, dated 15th October, 1808, the lands of *B.* were charged with a perpetual rentcharge in fee. By indenture of marriage settlement, dated 1st September, 1858, the rentcharge was conveyed to a trustee, his heirs, executors, administrators, and assigns, in trust to pay the rentcharge to the wife during her life, and after her death to and amongst the child or children of the intended marriage, in such shares and proportions as she should appoint; and, if there should be no child or children of the intended marriage, to the general appointees by deed or will of the wife. There were no further limitations of the rentcharge:—*Held*, that, there being sufficient indication of intention, there was no resulting use for the heir-at-law of the settlor, but that the children, on the death of the wife without appointing, took equitable estates in fee-simple in the rentcharge. *In re Stinson's Estate; M'Munn, Petitioner*
[ROSS, J., 47

2. —— *Will—Construction—Gift to wife with power to deprive child for disobedience—Legatee taking absolute interest beneficially or as trustee—Implied gift—Life estate to wife with remainder to children—Power of deprivation.*] By his will a testator provided as follows:—"I will, devise, and make over to my wife all real and personal property which I may hold in *A.* or elsewhere. I do not wish to deprive any of the five children we have of an equal share and share alike, but that their mother should have power at any time on their disobeying her, whom I leave as guardian over them, to deprive them of the whole or any portion of their share. He appointed his wife and another executors." He left a widow and five minor children surviving him:—*Held*, that the testator gave the whole of his property to his wife for life, and after her death to the children, with power to his wife at any time during her life to deprive any child of the share, to which he or she should otherwise be entitled at their mother's death, for disobedience. *Shields* v. *Shields*
[BARTON, J., 116

INDORSEMENT—Order—G. O. XLI., R. 1
See ATTACHMENT. [91

INDUSTRIAL AND PROVIDENT SOCIETY—Extension of objects—Unregistered rules—Winding-up - 69
See WINDING-UP. 1.

INFORMATION—Relator—Appearance in person - - - - - - - 325
See RELATOR.

INJUNCTION—Trade combination - 306
See TRADE COMBINATION.

—— University—Alteration of charter—Majority of corporation - - - - 370
See CHARTER.

INSTALMENT MORTGAGE—Compulsory purchase - - - - - 135
See MORTGAGE. 1.

—— Tenant for life—Purchase of perpetuity—Recoupment - - - - - 139
See MORTGAGE. 2.

INSURANCE.
See POLICY OF INSURANCE.

INTEREST—On appointed share - - 280
See POWER. 3.

INTERMEDIATE INTEREST — Testamentary appointment - - - - 280
See POWER. 3.

INTESTATES' ESTATES ACT — *Administration — Lands purchased under Land Purchase (Ireland) Acts—Realty or Personalty—Valuation under Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29)—*Local Registration of Title Act*, 1891, *ss.* 84, 85, 86.] Lands purchased under the Land Purchase (Ireland) Acts, subject to annuities payable to the Irish Land Commission, are for administration purposes to be valued as personalty under section 6, and not as realty under section 5 of the Intestates' Estates Act, 1890. *In re Naughten, deceased*; *Naughten* v. *Naughten*
[BARTON, J. 363

JOINT-TENANCY—*Will—Gift to children—Power of appointment.*] A testator gave real and chattel real property to *M.*, and desired that what he had left to her "she shall not have power to alienate or dispose of or incumber it in any manner whatsoever, but that it shall regularly descend to her children in such proportion or proportions as she may think right or proper." *M.* died without exercising the power, leaving four children. *Held*, that the children took as joint-tenants. *Welland* v. *Townsend* - WYLIE, J., for M.R. 177

JUDGMENT—Re-registration—Priority 292
See RE-REGISTRATION.

JURISDICTION — Estates Commissioners — Advance exceeding £3000 - 52
See LAND LAW (IRELAND) ACTS.
—— Estates Commissioners—Congested estate
See CONGESTED ESTATE. [183
—— Estates Commissioners — Substituted agreement - - - - - 334, 342
See BONUS. 1.
—— Land Commission — Rectification of disentailing deed—Supplying words - 1
See DISENTAILING DEED.
—— Land Commission—Town holding—Advance —Resale by Congested Districts Board
See CONGESTED DISTRICTS BOARD. [55

LAND LAW (IRELAND) ACTS—*Limitations on advances—Purchase of Land Amendment Act*, 1888 (51 & 52 *Vict. c.* 49), *s.* 2—*Advance exceeding £3000—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 1 (1)—*Zones.*] Where the Estates Commissioners have deemed it expedient, for the purpose of carrying out sales on the estate of the same landlord, to advance more than the sum of £3000 for the purchase of a holding, which was subject to a judicial rent, and the full amount applied for comes within the limitations mentioned in section 1 (1) of the Irish Land Act, 1903, they are not entitled to consider whether the said holding is sufficient security for the amount applied for. *In re Cooper's Estate* - - - - - WYLIE, J., 52
—— Bonus.
See BONUS.
—— Congested Districts Board — Purchase of estate including town — Advances by Land Commission - - - 55
See CONGESTED DISTRICTS BOARD.
—— Congested Estate—Restrictions on sale of
See CONGESTED ESTATE. [183
—— Estates Commissioners—Refusal to advance amount applied for—Substituted agreement - - - - - 334, 342
See BONUS. 1.
—— Evicted Tenants Acts.
See EVICTED TENANT.
—— Fair rent.
See FAIR RENT.
—— Notice of sale — Pending Land Purchase agreement - - - - 231
See NOTICE OF SALE.
—— Purchase under—Valuation as personalty—Intestates' Estates Act, 1890 ss. 5, 6
See INTESTATES' ESTATES ACT. [363
—— Restriction on mortgaging - - 271
See EQUITABLE MORTGAGE.
—— Resumption of holding for building—Acts, 1881, ss. 5, 8; 1896, s. 3 - 121
See RESUMPTION OF HOLDING.
—— Sale of yearly tenancy—Registration under Local Registration of Title Act—Effect of—Devise in tail - - - 23
See LOCAL REGISTRATION OF TITLE ACT.
—— Sanction of advance after death of landlord—Bequest of "securities and moneys invested" - - - - - 110
See CONVERSION. 2.
—— Subdivision—Consent—Conditions of sale
See SUBDIVISION. [157

LANDLORD AND TENANT — Land Law (Ireland) Acts.
See LAND LEW (IRELAND) ACTS.
—— Lease.
See LEASE.

LEASE—*for life in being—Order fixing fair rent—Devolution of lessee's interest—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 21—*Ejectment—Costs—Plaintiff successful on issues of law, unsuccessful on issues of fact.*] A testator holding a farm of land under a lease to the lessee, his heirs and assigns, for three lives, one of which was in existence at his death, by his will devised the farm to his wife during widowhood, and made a residuary bequest of his personal property to the plaintiff and another jointly, and died intestate as to the

LEASE—*continued.*
residue of his real property. His widow, before the death of the last life in the lease, had a fair rent fixed under the Land Law (Ireland) Act, 1881. The last life in the lease died in the lifetime of the widow, who subsequently purchased the fee under the Land Acts. *Held*, that the tenancy *pur autre vie*, notwithstanding the fixing of the fair rent, remained a tenancy *pur autre vie* for the purpose of devolution. *M'Evoy* v. *M'Evoy* ([1897] 2 I. R. 225) dissented from; *In re Ruttledge's Estate*, ([1895] 1 I. R. 328) followed. *Held*, further, that the tenancy from year to year arising on the determination of the tenancy *pur autre vie* was personal property of the testator, and passed to the plaintiff as survivor of the two residuary legatees in the will. Plaintiff at the trial was successful as to the two issues of law, but failed on the issues of fact. *Held*, that each of the parties should bear his own costs. *Ledwith* v. *Ross* - - Ross, J., 151

—— Ecclesiastical.
See ECCLESIASTICAL LEASE.

—— Vested in wife — Purchase by husband of reversion—Marriage prior to 1883 86
See MERGER.

—— Vested in wife for her separate use—Survivorship of husband—Marriage after 1883—Death of wife intestate—*Jus mariti* 95
See HUSBAND AND WIFE. 1.

LEGACY—"My house and farm"—Two holdings - - - - - 297, 300
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—— "Residuary legatee"—Real estate passing to—Context - - - - - - 239
See REAL ESTATE.

—— Testamentary power—Appointment to object on attaining 21—Intermediate interest
See POWER. 3. [280

—— To English charity - - - 20
See CHARITY.

—— To wife and children—Power of deprivation
See IMPLIED TRUST. 2. [116

LOCAL REGISTRATION OF TITLE ACT—*54 & 55 Vict. c. 66—Will—Construction of—Gift of realty and personalty to "A for life, and after his death to his issue"—Estate tail—Estate for life—Land Law (Ireland) Act*, 1896 (*59 & 60 Vict. c. 47*), *s. 32 (4)—Devise of freehold registered land sold under Land Purchase Acts—Effect of Local Registration of Title (Ireland) Act*, 1891.] A testator bequeathed four farms of land held by him from year to year to trustees in trust for "A for his life, and after his death for his issue lawfully begotten." The testator afterwards purchased the fee-simple of two of the farms under the Land Purchase Acts, and was registered as full owner thereof under the Local Registration of Title (Ireland) Act, 1891:—*Held*, that *A.* took an estate

LOCAL REGISTRATION OF TITLE ACT—*continued.*
tail in the registered lands, and an estate for life in the lands held from year to year. Freehold registered land sold under the Land Purchase Acts is real estate, and is subject to the ordinary rules of law as to the disposition of real estate, although it vests in the personal representative of the registered owner as if it were a chattel real, and (in the case of intestacy) the beneficial interest in it devolves as if it were personal estate. The provision in section 32 (4) of the Land Law (Ireland) Act, 1896, that "an agreement for purchase, a vesting order, or fiat shall not operate to convert the interest of the purchaser into real estate," merely provides for and deals with the interval between (*a*) the agreement for purchase, vesting order or fiat, and (*b*) the registration under the Local Registration of Title Act, 1891. *In re Longworth, deceased*; *Longworth* v. *Campbell* [M. R. 23

—— Intestates' Estate Act—Valuation as personalty - - - - - - 363
See INTESTATES' ESTATE ACT.

MAJORITY — Corporation — Acceptance of charter - - - - - - 370
See CHARTER.

MERGER—*Wife's chattel real—Marriage prior to 1883—Purchase by husband of reversion in fee.*] The mere purchase by a husband of the reversion in fee of chattels real, the property of his wife, their marriage having taken place before 1883, does not *per se* cause a merger. Decision of Barton, J., affirmed. *Hurley* v. *Hurley* - - APP. 86

MONEY—Whether passing under bequest of land or securities and moneys invested—Sale under Land Purchase Acts completed after testator's death - - - 110
See CONVERSION. 2.

MORTGAGE—*Instalments — Compulsory Purchase — Acquisition of land under Labourers Acts — Compensation — Jurisdiction of Local Government Board — Arbitrator — Irish Land Commission — Payment into Court — Labourers (Ireland) Act*, 1906, *s. 11 — Housing of the Working Classes Act*, 1890, *Schedule II., Articles* (9), (11) — *Lands Clauses Consolidation Act*, 1845, *ss. 108, 112, 115–118.*] Where a portion of land subject to a mortgage is taken under the provisions of the Labourers (Ireland) Act, 1906, the value of the part that is taken is to be assessed, and the sum so awarded is to be paid over to the mortgagee in satisfaction of his mortgage debt so far as the same shall extend. Where the arbitrator purports to award a small portion only of the compensation moneys to the mortgagee, his award is in this respect bad, even though the mortgagee had notice of the arbitration proceedings, and took no

MORTGAGE—*continued.*
steps to oppose the award or to set it aside. An instalment mortgage to the Commissioners of Church Temporalities in Ireland does not differ from any other mortgage in this respect. *In re Strahane Rural District Council* - Ross, J., for M.R. 135

2. ——— *Tenant for life — Recoupment — Instalments—Purchase-money of perpetuity rents secured by mortgage of the rents and repayable by instalment annuities—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 26.] By grants under the Irish Church Temporalities Acts certain lands were conveyed to *R.*, subject to perpetuity rents. In 1873 the said rents were purchased by *R.* Portion of the purchase-money was secured by mortgage, whereby the said rents were conveyed to the Church Commissioners, subject to the proviso that, if *R.* should pay to the Commissioners the principal sum thereby secured, with interest, by sixty-four half-yearly instalments, the Commissioners would re-convey the said rents as *R.* should direct; and the said mortgage contained a covenant by *R.* for payment of said principal sum by the instalments aforesaid, and empowered the Commissioners, in default of payment, to sell said rents. Under the will of *R.*, made prior to 1873, *H.* became entitled to said rents for his life, with power of disposal of same by deed, and, on his death, *J.* became entitled thereto for his life under deed of appointment made pursuant to said power. Portion of the lands out of which said rents were payable having been sold under the Land Purchase Acts, the executors of *H.* and *J.*, respectively, claimed to be recouped out of the redemption price of the apportioned parts of said rents redeemed in the matter, so much of the annual instalments paid by *H.* and *J.*, respectively, as represented capital. *Held*, that inasmuch as the principal sum secured by said mortgage was, prior to the execution thereof, a debt of *R.*, and, notwithstanding the special arrangement as to the mode of repayment, remained by the terms of said mortgage, both in case of default and by the covenant for repayment, a debt payable out of the entire fee, the executors of *H.* and *J.*, respectively, were entitled to be so recouped. *In re Nepean's Settled Estate* ([1900] 1 Ir. R. 298), and *In re Moffett* (39 Ch. D. 534) followed and applied. *In re the Duke of Leinster's Settled Estate* (23 L. R. Ir. 152), and *In re Gunning Moore's Estate* (40 I. L. T. R. 224), distinguished. *Semble*, the relative rights of tenant for life and remainderman are outside the scope and purpose of s. 26 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47). *In re Gore Booth's Estate* [Wylie, J., 139

—— Holding subject to Land-Purchase annuity—Restriction on—Equitable mortgage
See Equitable Mortgage. [271

NOTICE OF SALE—*Vendor and purchaser—Agreement for purchase under Land Purchase Acts—Subsequent sale by tenant—Notice of intention to sell—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 1—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 35.] When a Land Purchase agreement, conditional upon the estate of which the holding is a portion being sold under the Land Purchase Acts, has been entered into between landlord and tenant, the legal tenancy is not thereby determined; and the tenant, if he wishes to sell his interest in his holding with the benefit of the purchase agreement to a third party, is not relieved from the obligation of giving to the landlord the notice and information required by s. 1 of the Land Law (Ireland) Act, 1881. *R. (Fitzwilliam)* v. *County Council of Wicklow* (40 I. L. T. R. 180), explained. *In re Lynders* [Barton, J., 231

ORDERS, GENERAL — 1905 (Feb. 22nd), IV., Rr. 1, 2 - - - - - 325
See Relator.
—— XLI., R. 4 - - - - - - 91
See Attachment.
—— Appendix L., No. 16 - - - 38
See Apportionment.
—— 1909 (July 2nd)—Labourers Rule 55 386, [389
See Taxation of Costs.

PATENT. - - - - - - 370
See Charter.

PENALTY—Breach of trade agreement 306
See Trade Combination.

PERPETUITY — Rule against — Power of selection by tenant for life, his heirs or assigns - - - - 220
See Power. 2.

POLICY OF INSURANCE —For benefit of wife—Assignment by husband during lifetime of wife - - - 243
See Husband and Wife. 2.

POWER—*Appointment in excess—Appointment and settlement.*] Under a power to appoint a rent-charge to the children of a marriage an appointment was made by deed-poll giving a daughter of the marriage an absolute power of appointment, and, in default of appointment, to the said daughter for life, remainder to her husband for life, remainder to the next-of-kin of the daughter. By a deed executed three months subsequent to the execution of the deed-poll the daughter and her husband cited the deed-poll and agreed to postpone the interest taken respectively by them by the deed-poll to a certain other annuity charged on the same lands. *Held*, that the deed-poll and the subsequent deed constituted a good appointment and settlement. *In re Foot and Purdon's Estate* - - - Ross, J., 365.

POWER—*continued.*

2. —— *Settlement—Tenant for life—Failure of issue male—Power given to tenant for life, "his heirs or assigns," to select portion of settled lands—Exercise of power by tenant for life—Limitation after estates tail—Shifting use—Severable power—Rule against perpetuities.*] Certain lands were, upon the marriage of the plaintiff (then Viscount Bernard), settled upon the plaintiff for life, with remainder to his first and every son successively in tail male. In the event of failure of issue of the plaintiff the settlement contained the following clause: "And, in default of such issue, as to such part of the said hereditaments and premises (excepting the castle demesne and the demesne of Castle Bernard) as the said Viscount Bernard (the plaintiff), his heirs or assigns, shall select, not exceeding the gross annual value of £5000, to the use of the trustees or trustee and their heirs, upon trust to convey such part of the said hereditaments and premises as aforesaid to the said Viscount Bernard, his heirs and assigns, for ever, or as he or they shall direct, discharged from all incumbrances whatsoever. And as to the residue of the said hereditaments and premises, subject to all charges and incumbrances now affecting all the hereditaments hereinbefore expressed to be hereby assured, in full indemnification of the part of the said hereditaments and premises so to be selected by the said Viscount Bernard, his heirs or assigns, as aforesaid," to the use of the Hon. and Right Rev. C. B. Bernard for life, with remainder to the use of certain persons therein specified, successively for life, with remainder in tail male to the first and other sons of the last tenant for life with remainder over in default of such issue in strict settlement, and with an ultimate remainder to the right heirs of the plaintiff. There was no issue of the marriage, and the plaintiff executed two deeds by which, in exercise of his power of selection, he purported to select and appoint certain lands of the prescribed value. *Held*, that the two deeds were valid exercises of the power of selection, and that the power of selection which was given to "Viscount Bernard, his heirs or assigns," was divisible, and, in the event which happened, was not void for remoteness. *Miles* v. *Herford* (12 Ch. D. 691) applied. *Bandon* (*Earl of*) v. *Moreland* BARTON, J., 220

3. —— *Testamentary appointment to object on attaining twenty-one—Intermediate interest.*] *A.*, by will, gave the residue of his property to trustees in trust to invest same in Government funds, and to pay the interest and dividends thereof to his son *B.* for life, and thereafter to apply the principal to his (*B.'s*) children as he might appoint by deed or will, and in default of appointment equally. *B.*, by will, appointed that a sum of £5000 should

POWER—*continued.*

be paid to each of his younger sons and daughters on their attaining twenty-one, and the remainder to his eldest son. *B.* survived *A.*, and died before any object of the power attained twenty-one. On *B.'s* eldest daughter attaining twenty-one: *Held*, that she was entitled to the income of the £5000 so appointed from the death of *B.* *In re Lambert*, *deceased*; *Lambert* v. *Lambert* - - APP. 280

4. —— *Trustees—Deed—Construction—Right to an account.*] *M.* conveyed all his property to his trustees, and after giving directions for the management of the property, and after a trust in favour of his wife, continued: "Subject to the foregoing trust I direct my said trustees to hold all the said trust premises in trust for the support, clothing, maintenance, education, and advancement of all my children, with full power to my said trustees to declare, determine, and appoint, as in their own free discretion, the share or shares, and manner and time or times when any of my said children shall become entitled to any share so appointed to them, and I further empower my said trustees to appoint and convey to any of my said children, which they and the survivors or survivor of them, or the executor or administrator of the last surviving trustee of these presents may select, my farm at Ballyboy, and such chattel property thereon as my said trustees shall think fit, and subject to such charges in favour of the other of my children as the said trustees in their discretion may appoint and charge upon said lands and chattels." The deed further provided that any child guilty of certain conduct might be excluded by the trustees from all participation in the trust premises, and contained a provision for the distribution of the share of any child who should die intestate and unmarried after "his portion shall have vested in him." *Held*, that under the terms of the deed a son of *M.*, to whom no appointment had been made by the trustees, was not entitled to any share of the trust premises. *Held*, further, that no misconduct having been proved against the trustees, no account should in the circumstances of the case be directed against them. *Moran* v. *Moran* - - - - ROSS, J., 346

—— Default of appointment — Marriage settlement—Implied trust - - 47
See IMPLIED TRUST. 1.

—— Default of appointment — Will — Children taking as joint-tenants - - 177
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—— Of deprivation—Bequest to wife and children
See IMPLIED GIFT. 2. [116

—— Revocation of appointment — Will — Construction - - - - - - 258
See REVOCATION.

PRACTICE—Chancery Division—Attachment—Indorsement on order - - - 91
See ATTACHMENT.

—— Chancery Division — Conditions of sale — R.S.C., Appendix L. No. 16—Apportionment of poor rate in Dublin - 38
See APPORTIONMENT.

—— Chancery Division—Vendor and purchaser summons — Question of title affecting absent parties - - - - - 258
See REVOCATION.

—— Information—Relator—Suing in person 325
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—— Staying proceedings - - - 325
See RELATOR.

—— Taxation of costs — Labourers Act, 1906, s. 31—Deduction of title - - 386, 389
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PRESENT TENANCY—On expiration of first statutory term—Resumption by landlord
See RESUMPTION OF HOLDING. [121

PRIORITY—Judgments—Re-registration 292
See RE-REGISTRATION.

RATES — Conditions of sale — Apportionment—Poor rate—Municipal rate - - 38
See APPORTIONMENT.

REAL ESTATE — *Will—Construction — Legacy —Residuary legatee—Primarily referable to legatee of personal estate—When having an extended meaning—May embrace real estate — Charitable legacy, failure of—7 & 8 Vict. c. 97, s. 16.*] *Prima facie* "residuary legatee" refers only to the legatee of personal estate; but the context may enable the Court to give a wider meaning to the words "residuary legatee," and to hold that the words are wide enough to embrace real estate, which, in the events that have happened, is undisposed of. *Pitman* v. *Stevens* (15 East, 505) applied. *In re Greally*; *Travers* v. *Donoghue* - M.R. 239

—— Conversion.
See CONVERSION.

RE-CONVERSION OF ESTATE—Rightful order for sale - - - 13, 18
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RECOUPMENT—Tenant for life and remainderman—Instalment mortgage - - 139
See MORTGAGE. 2.

RECTIFICATION OF DEED — Supplying words - - - - - - 1
See DISENTAILING DEED.

REGISTRATION — Judgments — Re-registration—Priority *inter se* - - - 292
See RE-REGISTRATION.

RELATOR—*Information—Appearance in person — Staying proceedings — Signature to writ and statement of claim—Ord. IV., Rules 1, 2—Practice.*] In an information at suit of the Attorney-General he alone is recognized by the Court as plaintiff, and the relator must issue the writ and deliver the statement of claim by a solicitor, who (though in accordance with recognized practice he may be selected by the relator) is treated as solicitor for the Attorney-General. Accordingly, when the writ of summons was issued and signed, and the statement of claim signed and delivered, by the relator in person, the Court, on the application of the defendants, stayed the proceedings. The writ and statement of claim in such a case being nullities, a defendant is not precluded from making such an application by having entered an unconditional appearance to the writ. *Attorney-General (Humphreys)* v. *Governors of Erasmus Smith's Schools* - - - - - - - APP. 325

REMOTENESS.
See PERPETUITY

RENEWABLE LEASE—Forfeiture 23 & 24 Vict. c. 150, ss. 26–28 - - - 104
See ECCLESIASTICAL LEASE.

RENTCHARGE — Settlement — Default of appointment— Equitable estate in fee-simple—Implied trust for children 47
See IMPLIED TRUST. 1.

RE-REGISTRATION—*Judgment — Failure to re-register every five years—Priority.*] The failure to re-register judgments every five years in accordance with the provisions of the Judgment Mortgage Act, 1850, does not affect the priority of registered judgment creditors, *inter se*, but only as regards subsequent purchasers, mortgagees, and creditors. Four judgments originally entered in the Court of Exchequer in the years 1755, 1757, and 1758, were registered in accordance with the provisions of the Judgment Mortgage Act, 1850. One of the judgments was re-registered every five years; but, as regards the other judgments, there were gaps of over five years in the re-registration. *Held*, that the priority of the judgments, *inter se*, was not affected by the failure to re-register the judgments every five years. *In re Boyse's Estate*
[Ross, J., 292

RESIDUARY LEGATEE—Real estate passing to - - - - - - - 239
See REAL ESTATE.

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RESUMPTION OF HOLDING—*for building—Landlord and Tenant—Land Law (Ireland) Acts*, 1881, *ss.* 5, 8; 1896, *s.* 3 — *Expiration of first statutory term—Present tenancy.*] After the expiration of a first statutory term in a holding, and pending the present tenancy thereupon ensuing before a second statutory term is created, an application by a landlord not coming within the exceptions (*a*) and (*b*) of section 8 of the Act of 1881, to resume possession of a holding for the good of the estate, viz., for building purposes, cannot be entertained. *Diss.* HOLMES, L.J. *Callwells, Landlords; Reilly, Tenant* - - - - - APP. 121

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REVOCATION—*Vendor and purchaser—Will—Execution of power of revocation — Bequest inconsistent with appointment by deed with power of revocation—Doubtful title— Point of construction — Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.] *E. R.* was entitled for life to a house and lands at Lower Fennor, with power to appoint them to his children. In 1887 he conveyed the premises to a trustee for his eldest son, *E.*, charged with sums for his sons, *M.* and *J.*, and his daughter, *N.*, payable at twenty-one or marriage. The deed contained a power of revocation. The deed was not acted on; *E.* emigrated to Australia; *M.* died under age; *N.* lived in England; *J.* alone resided with his father on the premises. In 1902 *E. R.* made a will in favour of his son *J.*, in the following terms:—"I., *E. R.*, of Lower Fennor, bequeath my house and lands and all my property to my son *J.*" He had no other house save that in which he resided at Lower Fennor. *J.* succeeded to the premises on his father's death in the same year, and remained in possession until his death in 1906, when his widow succeeded to the premises under his will. In 1909 she sold the premises to *B. B.* objected to complete the purchase, on the ground that the deed of 1887 was not revoked by the will of 1902, and that a good title was not shown. *Held*, that the will operated as a revocation of the appointment made by the deed and a new appointment of the premises, and that a good title was shown. Observations as to the duty of the Court in deciding questions of title as between vendor and purchaser. *In re Reilly and Brady's Contract* [M. R. 258

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SUB-DIVISION—*Vendor and Purchaser—Conditions of sale—Misleading condition—Landlord and tenant—Land Acts—Consent of landlord—Limited owner—Tenant in tail—Estoppel—Power to consider real date of instrument.*] Section 17 of the Land Law (Ireland) Act, 1896, gives a limited owner a power of effecting a partition in a manner in which he could not do before, but there is nothing to make the procedure in accordance with that section imperative on an unincumbered absolute owner. If an unincumbered absolute owner gives his consent to a sub-division in writing, that is sufficient. A sub-division effected on 1st May may be validated by a subsequent consent of the landlord given on 6th May. *Tobin* v. *Cleary* (I. R. 7 C. L. 17) followed. Save in certain exceptional circumstances, the Court may consider the real date of the execution of an instrument, when that date is different from the date appearing by the instrument itself. *In re Maher and Nugent's Contract* - - - Ross, J., for M. R. 167

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TAXATION OF COSTS—*Local Government—Labourers (Ireland) Act*, 1906, *s.* 31—*Labourers (Ireland) Order*, 1909, *Rule* 55—*Costs of making title.*] Section 31 (1) of the Labourers (Ireland) Act, 1906, and Rule 55 of the Labourers (Ireland) Order, 1909, are retrospective, so as to displace

TAXATION OF COSTS—*continued.*
the jurisdiction of the Taxing Masters of the High Court, in respect of the taxation of a bill of costs, which was for work done before the passing of the Labourers (Ireland) Act, 1906, and was awaiting taxation at the date of the making the Labourers Order of 1909. *R.* (*Lady Mowbray and Stourton*) v. *Local Government Board*, distinguished; *Monaghan Rural District Council* v. *Smith*
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TRADE COMBINATION—*Agreement between traders to keep up prices—May be enforced by injunction—Agreement in restraint of trade—When combination to keep up prices is—Penalty—Liquidated damages — Deed —Construction—Escrow—Practice —Pleadings—Amendment.*] An agreement between a number of traders not to sell certain specified goods below certain specified prices is not necessarily unenforceable, as being in restraint of trade. Such an agreement, if bounded by reasonable limits of space and time, and made with a view to protecting local trade, as far as it may be legitimately protected, will, if necessary, be enforced by injunction against parties to the agreement who violate its provisions. Each case in which the question of restraint of trade or partial restraint of trade arises must be considered in the light of its own facts and circumstances. *Urmston* v. *Whitelegg* (53 L.T. (N.S.) 455; 55 J.P. 455) and *The Mogul Steamship Company* v. *M'Gregor, Gow, & Co.* ([1892] App. Cas. 25) distinguished. *Cade* v. *Daly*
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WILL — *Codicil — Construction — Revocation — Charge on lands devised—Substituted devisee—New or additional gift—Contribution* pro rata.] By will, a testator devised the lands of Blackacre to his eldest son *G.*, charged with £1000 in favour of testator's daughter, with a gift over of the lands to testator's younger son *T.*, in the event of the death of the elder son without issue, and he devised the lands of Whiteacre (including the lands of *L.*) to his younger son *T.*, charged with another sum of £1000 in favour of testator's daughter, with a similar gift over of these lands in favour of the elder son *G.*, in the event of the death of the younger son *T.* without issue, and testator appointed his two sons *G.* and *T.* residuary legatees. By codicil testator provided as follows:—I leave and bequeath the lands of *L.*, which are left to my son *T.* in my will, to my son *G.*, and also leave him my residuary legatee. *Held*, that the effect of the codicil was merely a substitution of the elder son *G.* for the younger son *T.* as devisee of the lands of *L.*, and that he took the lands of *L.*, subject, in conjunction with the rest of the land of Whiteacre originally devised to *T.* by the will, to the charge of £1000. *Lucas* v. *Lucas*
[BARTON, J., 353

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—— Charitable bequest—English charity—7 & 8 Vict. c. 97, s. 16 - - - 20
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—— Implied gift — To children — Qualifying absolute gift to wife—Power of deprivation - - - - - - 116
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—— "My house and farm"—Two holdings
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—— Testamentary appointment to object on attaining 21—Intermediate interest 280
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WINDING-UP—*Industrial and Provident Society—Extension of objects — Unregistered rules*—Ultra vires.] A society, formed for the purpose of carrying on trade as general dealers, manufacturers, and agents, was registered under the Industrial and Provident Societies Act, 1876, and its rules were duly registered. Subsequently a building department of the Society was formed, and separate rules for the building department were approved of at a special general meeting of the Society, but neither the building department nor its rules were registered under the Act. Subsequently it was decided to wind up the Society, and liquidators were appointed for the purpose of winding up its affairs:—*Held*, that the building department and the Society were not separate societies; but that the building department, not being registered, had no legal existence, and could not be wound up in the present liquidation, or under the Companies Acts, and that the liquidators of the Society had no power to deal with the assets of the building department, which

WINDING-UP—*continued.*
must be administered in a separate Chancery action. *In re Londonderry Equitable Co-operative Society* [Ross, J., 69

2. —— *Practice—Companies Acts—Petitions for winding-up—Where several presented, order will be made on petition first presented—Special circumstances may justify departure from the rule.*] Where several petitions for the winding-up of a company have been presented in different Courts, unless some very special grounds exist, the winding-up order will be made upon the petition first presented. *Semble*—A hostile attitude on the part of the petitioners towards other unsecured creditors would amount to such special grounds. *The Official Co-operative Society*; *Ex parte M'Donnell* (21 L. R. I. 385) considered. *In re Bamford, Limited* [M. R. 390

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